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THE
PUNJAB RECORD,

OR

Reference Book for Civil Officers,

CONTAINING

THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY
THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM
THAT COURT, AND DECISIONS BY THE FINANCIAL
COMMISSIONER OF THE PUNJAB.

REPORTED BY

C. H. OERTEL, BARRISTER-AT-LAW.

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JUDGES OF THE CHIEF COURT 1916.

CHIEF JUDGE :

THE HON. SIR DONALD JOHNSTONE, KT.

JUDGES :

THE HON. MR. JUSTICE H. A. B. RATTIGAN—*Up to 11th May 1916—On leave.*

” ” ” ” SHAH DIN.

” ” ” ” W. CHEVIS.

” ” ” ” H. SCOTT-SMITH.

” ” ” ” SHADI LAL—(*Temporary Judge from 19th March 1914*).

” ” ” ” W. A. LEROSSIGNOL—(*Temporary Judge from 21st October 1914*).

” ” ” ” L. H. LESLIE JONES—(*Temporary Additional Judge from 4th October 1915 to 3rd April 1916 and from 23rd October 1916*).

” ” ” ” A. B. BROADWAY—*From 12th May 1916 to 2nd August 1916 and from 3rd October 1916—Officiating.*

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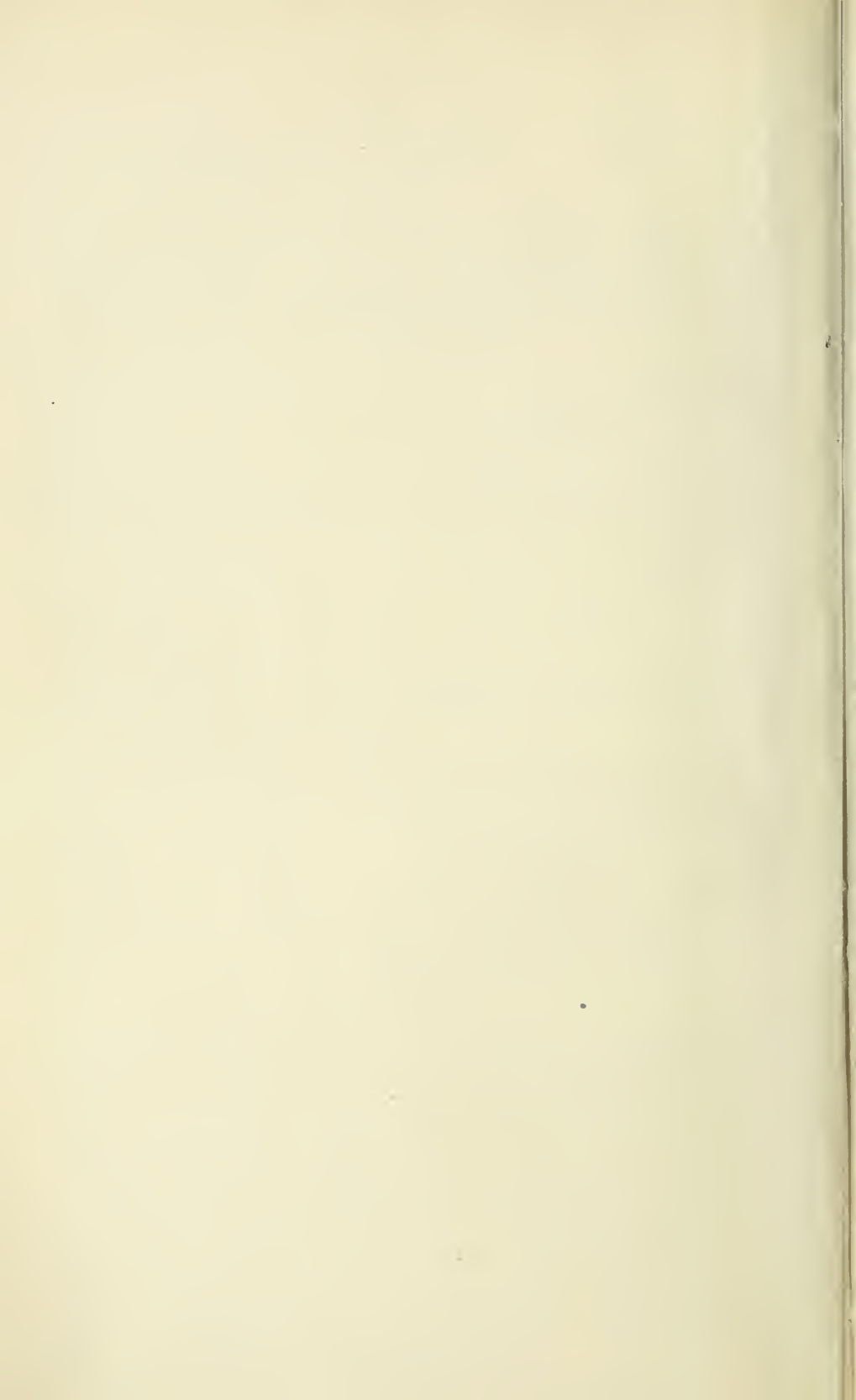


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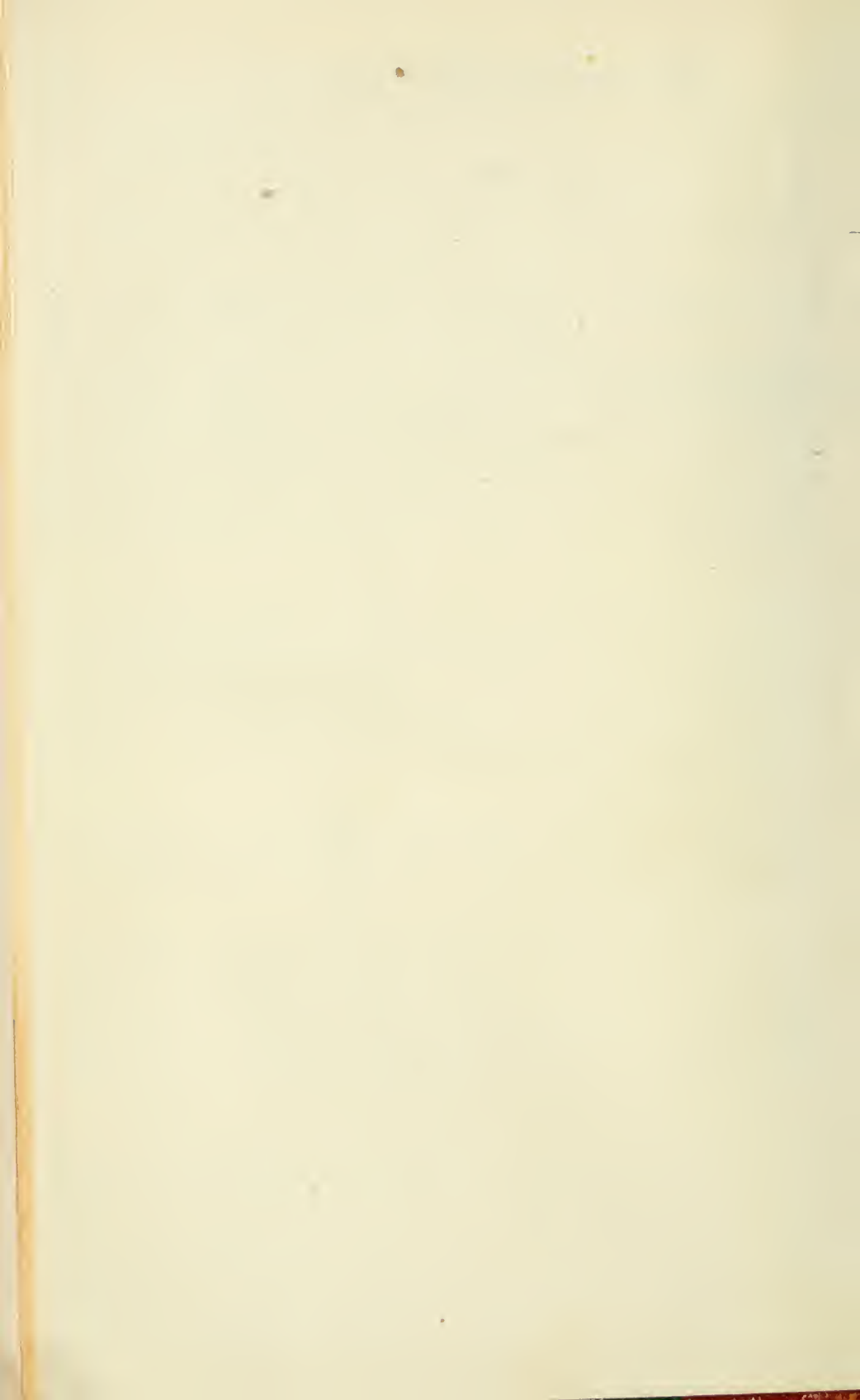
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A

ABADKAR.

Status of widow of—who has herself acquired proprietary rights on payment of the necessary money.

See *Government Tenants (Punjab) Act, 1893.*

No. 129 P. R. 1916.

ABATEMENT.

(1) *Of appeal against all respondents on death of one respondent and failure to bring his representatives on the record within time—ignorance of law—no excuse.*

In this case the plaintiff sued for possession of certain land alleging that it had been mortgaged by his father to the ancestor of the 20 defendants and that the mortgage debt had been discharged and he also claimed a declaration of his title as proprietor in the *shamilat* appertaining to the area under mortgage. The first Court dismissed the suit. The plaintiff appealed and at the hearing it transpired that one of the respondents had died more than six months before the appeal came on for hearing and thereon the Court rejected the appeal as against all the respondents. The plaintiff then preferred a second appeal to the Chief Court.

Held, that appellant had failed to prove that he was not aware of the death of the respondent until such time as it was practically impossible for him to file an application within the period of six months from the date of death

Held also, that ignorance of the law is not a sufficient cause for not presenting the application.

41 P. R. 1915 and 204 P. L. R. 1912, referred to.

113 P. R. 1907, distinguished.

Held further, that as the suit could not have proceeded at all unless the respondent (since deceased) in his capacity as a co-mortgagee had been impleaded in the first instance the lower Appellate Court was right in holding that the appeal abated *in toto*.

I. L. R. 22 Bom. 718, *I. L. R.* 26 Bom. 203 and *I. L. R.* 34 Cal. 1020, disapproved.

41 P. R. 1915 and *I. L. R.* 22 All. 430, referred to.

No. 3 P. R. 1916.

ABATEMENT—*concl'd.*

(2) Where application to bring heirs of deceased party on record is not made within six months, unless there is sufficient excuse.

See *Civil Procedure Code*, 1908 (15).

... .. No. 118 P. R. 1916.

(3) *Order of—whether appealable as a decree—Civil Procedure Code*, 1908, section 104, orders 22, rule 9, and 43 (1) (k)—*Civil Procedure Code*, 1882, section 366—*difference between old and new Code and in rulings of High Courts, pointed out.*

Held, that under the provisions of the new Code of Civil Procedure a suit abates if the plaintiff dies and no application is made within the prescribed period to bring the legal representatives on the record, and that it is not necessary to make an order that the suit shall abate, as was required under the old Code, section 366. If the Court, however, passes a purely formal order recognising the abatement, which is a *fait accompli*, such order cannot be treated as a decree.

The conflict of authority between the High Courts of Bombay and Madras and of Allahabad pointed out :—*I. L. R.* 10 *Bom.* 220, *I. L. R.* 18 *Mad.* 496 and 30 *Mad. L. J.* 486 and *I. L. R.* 17 *All.* 172, *I. L. R.* 25 *All.* 206 and 12 *All. L. J.* 1113, referred to.

Held also, that upon such abatement the legal representative may, under order 22, rule 9, make an application for the revival of the suit and the only question the Court is thereupon required to determine is, whether the applicant was prevented by any sufficient cause from continuing his suit, and if the decision is in the negative, the aggrieved party is entitled to prefer an appeal against that order under order 43, rule 1 (k) of the new Code.

Held further, that order 22, rule 9 (2), is confined to cases in which abatement takes place by reason of an application not having been made within time to implead the legal representative of the deceased party and that it has no application to cases in which the suit has abated on account of some other cause as *e. g.* when the Court holds that the right to sue does not survive or that the death of one of several plaintiffs causes an abatement *in toto*.

31 *Indian Cases* 4 (*Mad.*), referred to.

And held, that in the latter cases the orders of the Court would be decrees and appealable as such.

Held generally, that when the order of the Court merely recognises abatement which has already taken place on account of the death of a plaintiff not followed by an application within 6 months to implead his legal representatives and does not determine any matter in controversy between the parties, it cannot be regarded as a decree. If on the other hand the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy and is not passed upon an application for the revival of the suit made under order 22, rule 9, it amounts to a decree and is appealable as such.

... .. No. 128 P. R. 1916 (F. B.)

ACQUIESCENCE.

Whether a question of law or facts—mere delay not proof of.

See *Second appeal* (13).

... .. No. 107 P. R. 1916.

ACTS.

VI of 1869—See *Indian Divorce Act*, 1869.

VII of 1870—See *Court Fees Act*, 1870.

I of 1872—See *Indian Evidence Act*, 1872.

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I of 1877—See *Specific Relief Act*, 1877.

III of 1877—See *Indian Registration Act*, 1877.

XV of 1877—See *Indian Limitation Act*, 1877.

IV of 1882—See *Transfer of Property Act*, 1882.

VI of 1882—See *Indian Companies Act*, 1882.

XVI of 1887—See *Punjab Tenancy Act*, 1887.

XVII of 1887—See *Punjab Land Revenue Act*, 1887.

VIII of 1890—See *Guardians and Wards Act*, 1890.

III of 1893—See *Government Tenants (Punjab) Act*, 1893.

I of 1894—See *Land Acquisition Act*, 1894.

X of 1897—See *General Clauses Act*, 1897.

I of 1900—See *Punjab Limitation Act*, 1900.

XIII of 1900—See *Punjab Alienation of Land Act*, 1900.

I of 1904—See *Punjab Loans Limitation Act*, 1904.

II of 1905—See *Punjab Pre-emption Act*, 1905.

III of 1907—See *Provincial Insolvency Act*, 1907.

V of 1908—See *Civil Procedure Code*, 1908.

IX of 1908—See *Indian Limitation Act*, 1908.

XVI of 1908—See *Indian Registration Act*, 1908.

III of 1911—See *Punjab Municipal Act*, 1911.

I of 1913—See *Punjab Pre-emption Act*, 1913.

I of 1914—See *Punjab Excise Act*, 1914.

III of 1914—See *Punjab Courts Act*, 1914.

III of 1914—See *Indian Copyright Act*, 1914.

ADOPTION.

Validly made—not revocable.

See *Hindu Law* (11).

... .. No. 123 P. R. 1916.

ADVERSE POSSESSION.

As against all descendants of common ancestor and alienor.

See *Indian Limitation Act*, 1908 (12).

... .. No. 113 P. R. 1916.

AFTER BORN SON.

Not bound by ratification by nearest collateral "after" son's birth.

See *Custom (Alienation)* (11).

... ..

No. 105 P. R. 1916.

ALTERNATIVE CLAIMS.

By several plaintiffs.

See *Civil Procedure Code*, 1908, (11).

... ..

No. 10 P. R. 1916.

APOSTACY.

Conversion of a member of a joint Hindu family to Muhammadanism—effect of—limitation for suit by convert for his share in the co-parcenary property on separation—Indian Limitation Act, IX of 1908, articles 142 and 127.

One Ganda Mal, a Khatri, had 3 sons, G. M. who died in 1888, B. D. who died in 1893 and K. C. who died in 1909. G. M. had 2 sons R. R. and M. R., the former died sonless and the latter, the present plaintiff, became a Muhammadan. K. C. left 2 daughters, Mussammats H. D. and G. D., the former of whom is now represented by her son G. S.; B. D. died sonless. When K. C. died he had in his possession a considerable property, a small part of which was ancestral having been held either by Ganda Mal or some more remote ancestor, the remaining property was acquired after Ganda Mal's death. When K. C. died the whole of his property was taken by Mussammats G. D. and G. S., against whom in 1911 the plaintiff brought the present suit for possession of the whole property by survivorship as a member of a joint Hindu family still existing at time of K. C.'s death. Plaintiff became a Muhammadan 10 or 11 years before suit, *i.e.*, in the lifetime of K. C.

Held, that the effect of plaintiff's conversion to Muhammadanism was *ipso facto* to separate him from the co-parcenary—

I. L. R. 25 All. 546 (573), referred to—

Held also, that as plaintiff by reason of his conversion to Islam was not a member of the joint Hindu family at the time when the suit was instituted it was for him to prove that the separation of the family had taken place not more than 12 years before suit.

I. L. R. 18 All. 90, referred to.

Held further, that plaintiff had failed to prove that he remained a member of the joint Hindu family as late as within 12 years of institution of suit and that consequently a suit by him for a share of co-parcenary property on separation was barred by time—article 142 of the Limitation Act.

Held consequently, that all the plaintiff could claim was his share in the ancestral property.

... ..

No. 57 P. R. 1916.

APPEAL (CIVIL).

(1) Court-fee on—when appellant objects that the decretal amount should not have been made realisable from certain property.

See *Court-fee* (1).

... .. No. 11 P. R. 1916.

(2) Court-fee on—where the whole subject matter of the suit is in appeal as well as part and the value of the part exceeds that of the whole.

See *Court-fee* (2).

... .. No. 25 P. R. 1916.

(3) *Whether competent by agent—when principal has withdrawn from the contest.*

The plaintiff sued the Municipal Committee of Delhi for certain reliefs in respect of certain land sold by the Committee to certain persons which had eventually been transferred to plaintiff. The Committee pleaded *inter alia* that they had sold the leases as trustees of the Crown and the Secretary of State then applied to be made a party to the suit, which was ordered accordingly. The first Court overruled the objections of both defendants and found in favour of plaintiff throughout and decreed accordingly. From this decree the *Committee alone* appealed and the Divisional Judge accepted the appeal and dismissed the plaintiff's claim.

Plaintiff then lodged a further appeal to the Chief Court.

Held, that on the pleadings of the Committee that they had only acted as agents of the Secretary of State, the Committee was not competent to contest the appeal to the Divisional Judge when the principal had withdrawn from the contest and that the first Court's decree in favour of plaintiff must consequently be restored.

... .. No. 26 P. R. 1916.

(4) When competent from a decree on an award of arbitrators.

See *Civil Procedure Code*, 1908 (21).

... .. No. 28 P. R. 1916.

(5) from order passed on review—when competent.

See *Dismissal for default*.

... .. No. 115 P. R. 1916.

(6) from order setting aside award of arbitrators—Court-fee on appeal.

See *Civil Procedure Code*, 1908 (7).

... .. No. 117 P. R. 1916.

ARAINS.

Jullundur City—power of testation.

See *Custom (Alienation)* (12).

... .. No. 122 P. R. 1916.

ARBITRATION.

(1) Appeal or revision from decree passed on award of arbitrators, when admissible.

See *Civil Procedure Code* 1908 (21).

... .. No. 28 P. R. 1916.

(2) Court cannot refer whole proceedings under the Provincial Insolvency Act to arbitrators for decision.

See *Insolvency*.

... .. No. 50 P. R. 1916.

(3) Award—revision from decree—material irregularity—*Civil Procedure Code, Act V of 1908, schedule II, article 12—extent of Court's power to modify award—jurisdiction.*

Held, that material irregularity on the part of the Court in dealing with objections to an award of arbitrators is a ground for revision, though it is no ground for revision that the arbitrator himself has been guilty of some misconduct and that the Court has wrongly adjudicated upon the objections raised regarding that misconduct.

Held also, that modifications and corrections of an award by the Court must be confined to the limits laid down in schedule II, article 12 of the Code of Civil Procedure and a Court acts without jurisdiction if it goes beyond that and makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances.

... .. No. 78 P. R. 1916.

(4) Proceedings in case dismissed for default, continue where they left off, on restoration of case.

See *Dismissal for default*.

... .. No. 115 P. R. 1916.

(5) Appeal or revision from order setting aside award—Court can hear objections to award notwithstanding that parties agreed expressly to accept award without objections.

See *Civil Procedure Code*, 1908 (7).

... .. No. 117 P. R. 1916.

ARORAS.

Alienation by widow—status of reversioners to contest same, in presence of a daughter.

See *Hindu Law* (3).

... .. No. 27 P. R. 1916.

ASSAULT AND BATTERY.

Suit for damages in respect of—whether expenses on criminal prosecution can be recovered—whether amount of damages is a question of fact or law.

See *Torts*.

... .. No. 17 P. R. 1916.

AWARD.

See *Arbitration*.

B

BANIAS.

Tebsil Mukhtsar—adopted son—succession in natural family.

See *Custom (Succession)* (7).

... .. No. 45 P. R. 1916.

BENAMI SALE.

Whether person in possession of the property can be allowed to set up his own fraud.

The plaintiffs sued for possession of property under a deed of sale dated 17th June 1891 made by the father of defendants in favour of plaintiff's father. Defendants pleaded that the deed was *benami*, executed solely to save the property from the attacks of creditors. Plaintiffs urged that defendants could not be allowed to set up their own fraud on the maxim "*nemo allegans turpitudinem suam audiendus est.*"

Held, that the maxim relied on by plaintiffs must give way to the maxim "*in pari delicto potior est conditio possidentis*" as the defendant was in possession of the property and that the latter could consequently be permitted to set up the true facts of the transaction.

13 *Moo. I. A.* 551 (*P. C.*), 21 *W. R.* 422, 24 *W. R.* 391, *I. L. R.* 18 *Bom.* 372, 8 *Cal. W. N.* 620, *I. L. R.* 1 *All.* 403, 61 *P. R.* 1895, 25 *P. R.* 1905 and *I. L. R.* 35 *Cal.* 551 (*P. C.*), referred to.

I. L. R. 31 *Bom.* 405 and *I. L. R.* 37 *Bom.* 217, disapproved.

... .. No. 21 P. R. 1916.

BRAHMINS.

(1) Of *Tahsil* Palwal, district Gurgaon—succession to self-acquired property—daughters or collaterals in 3rd degree.

See *Custom (Succession)* (1).

... .. No. 7 P. R. 1916.

(2) *Mauza* Abbepur, *thana* Amb, Hoshiarpur District—self-acquired property—custom—succession by daughter.

See *Custom (Succession)* (4).

... .. No. 23 P. R. 1916.

(3) Kangra District—widow of adopted son does not succeed collaterally.

See *Custom (Succession)* (6).

... .. No. 44 P. R. 1916.

(4) Adoption amongst—*Mauza* Nurpur, Hoshiarpur District—although forming a compact village community—has not lost all religious significance.

See *Custom (Adoption)*.

... .. No. 66 P. R. 1916.

C

CIVIL PROCEDURE CODE, V OF 1908.

(1) SECTION 11.

"Former" suit—several suits decided by one judgment.

See *Custom (Alienation)* (7).

... ..

No. 48 P. R. 1916.

(2) SECTION 11, EXPLANATION 4.

Res judicata—matter which ought to have been made ground of attack in a previous suit—suit to include whole claim—conflict of authority, as to whether a plaintiff in a suit for possession must put forward all his titles or not, pointed out.

One H., a Gujar, gifted his estate to his 2 daughters, Mussammat A. and Mussammat S. B., half and half and had mutation effected in their respective names. Mussammat S. B. died in 1907 and H. then took possession of her share and mutation was effected in his favour. H. died some three or four years later and on his death his widow applied to have this land mutated in favour of her other daughter Mussammat A. Upon this the present plaintiff, the husband of the deceased daughter Mussammat S. B., and other collaterals of H. sued the widow and Mussammat A. for a declaration that the application by the widow which they described as a gift to Mussammat A. should not affect their reversionary rights on the death of the widow. This suit failed on the ground that Mussammat A. was the *khanudamad* of her late father. Thereon the plaintiff instituted the present suit in which he claims to recover possession from Mussammat A. on the ground that after the death of Mussammat S. B., his late wife, he was entitled to succeed to the property given to his wife. It was contended by defendant that the present suit is barred under section 11 and order 2, rule 2 of the Code of Civil Procedure.

Held, that as in the previous suit plaintiff was only one of several joint plaintiffs who were seeking merely a declaratory decree of their alleged reversionary rights and were not claiming possession and as in that suit the present claim based upon plaintiff's alleged exclusive title to present possession of the land would have been inconsistent with the claim set up by the plaintiffs in the previous suit, neither section 11, explanation 4, or order 2, rule 2 were applicable to the present suit.

6 P. R. 1886 and 68 P. R. 1915, referred to.

The conflict of authority, as to whether in a suit to recover possession of property a plaintiff is bound to support the claims made by him by bringing forward every title which he has, or claims to have, in respect of such property, pointed out.

Authorities cited for the proposition that he must put forward all his title :—

I. L. R. 2 Cal. 152, I. L. R. 3 Cal. 23, I. L. R. 4 All. 21, I. L. R. 3 Bom. 137, I. L. R. 25 Bom. 189, I. L. R. 31 Mad. 385 and 146 P. R. 1890.

CIVIL PROCEDURE CODE, V OF 1908.—*contd.*

Contra : *I. L. R. 2 Cal. 152* (3) per Garth, C. J., 8 *Bom. II. C. R. 89*, *I. L. R. 2 Mad. 352*, *I. L. R. 4 Mad. 308*, *I. L. R. 7 Mad. 264*, *I. L. R. 26 Mad. 760*, *I. L. R. 27 Mad. 102* (104), *I. L. R. 22 Mad. 323*, *I. L. R. 2 All. 582*, *I. L. R. 6 All. 358* and 1 *All. L. J. 228*.

... .. No. 94 P. R. 1916.

(3) SECTION 20.

Ancestral home visited occasionally, but actual residence elsewhere.

See *Second Appeal* (14)

... .. No. 112 P. R. 1916.

(4) SECTION 20 (c).

Jurisdiction of Court at place where the money due under a pro-note is payable.

See *Jurisdiction (Civil)* (1).

... .. No. 2 P. R. 1916.

(5) SECTIONS 20 (c) AND 21.

Jurisdiction—suit for damages for breach of betrothal—where tried by wrong Court—how dealt with by Appellate Court.

Plaintiff sued at Tarn Taran to recover damages for breach of a betrothal contract and obtained a decree. The defendants appealed to the District Judge who set aside the decree on the ground that the first Court had not jurisdiction as the defendants, the parents of the girl, resided in the Sialkot district.

Held, that as the contract of betrothal was made at Tarn Taran the cause of action arose in part at Tarn Taran, *vide* section 20 (c) of the Code of Civil Procedure, 1908, and the Court there had consequently jurisdiction to entertain the suit.

57 *P. R.* 1874 and 147 *P. R.* 1882, distinguished, as applicable only to section 17 of the Code of 1877 and not to section 17 of the Code of 1882 or section 20 of the present Code.

Held also, that even if the Munsiff of Tarn Taran had no jurisdiction to entertain the suit his judgment should not have been set aside, unless the District Judge was satisfied that there had been a failure of justice by reason of the suit being instituted at the wrong place, *vide* section 21 of the Code.

No. 93 P. R. 1916.

(6) SECTION 104 AND ORDER 22, RULE 9, AND ORDER 43 (1) (k).

Suit abates *ipso facto* if plaintiff dies and no application is made within limitation to bring the legal representatives on the record—order of Court recognising such abatement not a decree.

See *Abatement* (3)

... .. No. 28 P. R. 1916 (F. B.)

CIVIL PROCEDURE CODE, V OF 1908—*contd.*

(7) SECTION 104 (d) AND (f).

Appeal from order setting aside award of arbitrators made on reference by Court—Decree—Revision—Court entertaining objections notwithstanding agreement of parties to accept award without objection—Court-fee on appeal—Court Fees Acts, Schedule II, article 17 (vi)—mala fides of arbitrators—Ground for setting aside award—Jurisdiction of Civil Court to deal with that part of an award, which divides agricultural land—Punjab Land Revenue Act, XVII of 1887, section 158.

The parties to this case, being a father and his two sons, entered into an agreement to refer the division of their joint property to arbitrators—one of the clauses of the agreement was “the arbitrators are authorized to partition between us our entire property—and to allot unequal shares to us. But they are not authorized to exclude any party altogether. * * * None of the parties shall be competent to object to or refuse to submit to the award of the arbitrators.”

Application was made by one of the sons after some time under article 17, Schedule II of the Code of Civil Procedure to file the agreement in Court and the parties again agreed to the submission to the arbitrators in terms of their agreement and that they shall abide by their decision, i.e. the award which the arbitrators may file.

Reference was, therefore, made and the arbitrators filed their award. Both sides filed their objections but only those of the defendants were serious. Dealing with them the Court found that the award gave practically no share to the father, defendant 1, which was against the terms of the agreement, and that the arbitrators were also guilty of certain misconduct and passed a decree dismissing both the applications for filing the agreement and of award. The plaintiff appealed to the Chief Court against the order of the lower Court under section 104 (d) and (f) of the Court of Civil Procedure.

Held that section 104, clauses (d) and (f) had no application, (d) as notwithstanding the peculiar wording of the decree the lower Court did not refuse to file the agreement to refer, nor did it refuse to act upon it, and as regards (f), the award was not made without the intervention of the Court.

9 P. R. 1913 and 28 P. R. 1914, referred to.

Held also, that the rejection or acceptance of an award is not ordinarily open to revision, (a) as the order disposes of a question of law and thus the order, even if wrong, cannot be called a material irregularity, and (b) appellant has another remedy by regular suit.

66 P. R. 1915, 21 P. R. 1898 (F. B.) (p. 59), 25 P. R. 1902 (P. C.) p. 101, 89 P. R. 1902 (F. B.) and I. L. R. 30 Cal. 397 (F. B.), referred to.

Held further, that in the present case the lower Court did not act *ultra vires* in hearing objections notwithstanding that the parties undertook by their agreement to raise no objections to the award.

CIVIL PROCEDURE CODE, V OF 1908—*contd.*

I. L. R. 6 *Mad.* 368 and Indian Contract Act, section 28, referred to.

Correctness of *dictum* of Rattigan, J. in Civil Appeal 1997 of 1912, (unpublished), doubted.

Held however, that the order of the lower Court amounted in law to a "decree" and was as such appealable.

25 *P. R.* 1902 (*P. C.*) p. 99, 84 *P. R.* 1901 (*F. B.*) (last part), 126 *P. R.* 1907, *I. L. R.* 27 *Mad.* 255, referred to.

28 Indian Cases 60 (Sind), disapproved.

I. L. R. 5 *All.* 333 (*F. B.*), *I. L. R.* 6 *All.* 186 (*F. B.*), *I. L. R.* 21 *Bom.* 63, *I. L. R.* 25 *Cal.* 757 (*F. B.*), and 1 *P. L. R.* 1911, distinguished.

Held further, that the appeal asking this Court to cancel the order setting aside the award and to remand the case to be dealt with according to law embodied a prayer that cannot be valued in money and falls under article 17 (vi) of Schedule II of the Court Fees Act, and that the Rs. 10 Court-fee put in by appellant was consequently sufficient.

Held, lastly, that a Civil Court has jurisdiction to deal with that part of an award which fixes the shares of the parties in agricultural land, as this is not an actual partition of the fields but merely a division of shares and only settles title.

... .. No. 117 P. R. 1916.

(8) SECTION 105 AND ORDER 43, RULE 1 (d).

Appeal from an order setting aside a decree passed ex-parte—whether competent, and whether errors made by Court in making such an order can be raised in appeal from the decree.

Held, that while an appeal lies under order 43, rule 1 (d) of the Code of Civil Procedure against an order refusing to set aside a decree passed *ex-parte* no appeal lies against an order setting aside such a decree.

Held also, that any error, etc., made by a Court in setting aside an *ex-parte* decree, is not an error, etc., "affecting the decision of the case" within the meaning of section 105 of the Code and therefore cannot be "set forth as a ground of objection in the Memorandum of Appeal."

I. L. R. 25 *All.* 280, followed.

... .. No. 40 P. R. 1916.

(9) SECTION 110 AND ORDER 45, RULE 3.

Application for leave to appeal to Privy Council.

Where the decree of the Chief Court affirmed the decision of the Court immediately below and the decision of both Courts was based solely on the facts which were held to be established although this involved the decision on a point of limitation in respect of a small portion of the property in dispute.

CIVIL PROCEDURE CODE, V OF 1908—*contd.*

Held that, as no substantial question of law was involved in the proposed appeal to His Majesty in Council within the meaning of section 110 of the Code of Civil Procedure and the case was not "otherwise" a fit one for such an appeal under order 45, rule 3, the application for a certificate must be rejected.

I. L. R. 23 All. 94 and I. L. R. 23 All. 227 (231) (P. C.), referred to.

... .. **No. 64 P. R. 1916.**

(10) SECTION 113 AND ORDER 46, RULE 1.

Reference to Chief Court in cases open to further appeal—Pre-emption—effect of notification by Local Government (withdrawing right of pre-emption to land such as that in suit) on appeal after a decree for pre-emption has been passed.

Held, that under section 113, read with order 46, rule 1 of the Code of Civil Procedure, reference to Chief Court should only be made in cases not open to further appeal.

Held also, that where a pre-emptor has obtained a decree for pre-emption and during pendency of an appeal by the other side all rights to pre-empt with regard to land like the land in suit cease to exist, by reason of a notification issued by the Local Government, the decree should be upheld, unless fault can be found with it by the Appellate Court.

10 P. R. 1913, distinguished.

65 P. R. 1913, referred to.

... .. **No. 130 P. R. 1916.**

(11) ORDER 1, RULE 1.

Legality of suit by different sets of plaintiffs claiming in the alternative.

The parties were Aroras of Sialkot. The suit was by two sets of plaintiffs, *viz.* the brother's sons and (2) the daughters of one L. S., deceased, against the defendant, the widow of a grandson of L. S. The plaintiffs claimed that either the nephews or the daughters are the legal heirs of L. S. and that they have by agreement arranged to divide the property in the event of either set of plaintiffs succeeding in the suit.

Held that, having regard to the provisions of order 1, rule 1 of the Code of Civil Procedure which contemplate, even if they do not actually encourage, claims by different plaintiffs in the alternative, provided there is a common question of law or of fact which would arise if such plaintiffs brought separate suit, the suit should not have been dismissed on the ground that the plaint contained contradictory allegations and made inconsistent claims.

... .. **No. 10 P. R. 1916**

CIVIL PROCEDURE CODE, V OF 1908—*contd.*

(12) ORDER 2, RULE 2.

Does not debar a puisne mortgagee from suing to enforce his rights notwithstanding a previous suit by another mortgagee to which he was no party.

See MORTGAGE (7).

No. 86 P. R. 1916.

(13) ORDER 20, RULE 2.

Validity of judgment of a Judge written after he has been transferred and pronounced by himself.

Held, that a judgment written by a Judge who heard the case, after his transfer, is not illegal, *vide* order 20, rule 2 of the Code of Civil Procedure, and the fact that the transferred officer himself pronounced the judgment does not make any difference.

I. L. R. 30 Bom. 241 and *I. L. R.* 34 Cal. 293, referred to.

No. 80 P. R. 1916.

(14) ORDER 21, RULES 58 AND 63.

Res judicata—fresh application for sale and proclamation—whether new cause of action.

Plaintiff, the son of a judgment-debtor whose property had been attached in execution of a decree, had preferred an objection which was rejected summarily by reason of its belated appearance. He had then brought a regular suit for a declaration but that suit was dismissed for default in December 1912. Owing to failure to secure an adequate bid the decree-holder in 1912 had withdrawn his execution but presented a fresh application for sale by auction in 1915 and proclamation of sale was made. Plaintiff then brought the present suit for the same declaratory relief as in the 1912 case.

Held, that the suit was barred by time (article 11, Limitation Act) and that the fresh proclamation of 1915 furnished no fresh cause of action which was the same as in the previous suit of 1912, *viz.* the attachment and proclamation of auction and that, as the previous suit in 1912 was not proceeded with or withdrawn with leave to bring another suit, the order rejecting plaintiff's objection was now conclusive under rule 63 of order 21 of the Code of Civil Procedure, which modifies the old law of section 283 of the Code of 1882 and applies to all objections by *third parties*.

27 *Indian Cases* 944 (945), referred to.

No. 66 P. R. 1916.

(15) ORDER 22, RULES 4 (3) AND 9 (2).

Abatement—application to substitute names of heir of deceased party—limitation—sufficient cause for not presenting application in time—ignorance of death.

CIVIL PROCEDURE CODE, V OF 1908—*contd.*

Held, that application for substitution of names of heirs of a deceased party must be made within 6 months of the death or the suit (or appeal) must abate—order 22, rule 4 (3), Civil Procedure Code—and the plaintiff or appellant is out of Court unless he can satisfy the Court that he was prevented by any sufficient cause from continuing the suit—order 22, rule 9 (2)—*i. e.*, “the party must satisfy the Court that he had sufficient excuse for not applying in time.”

Held also, that in the present case it had not been shewn that the appellant was not aware of the death of the respondent long before he made his application, and even if he was, his ignorance implied great negligence.

60 *P. R.* 1911, referred to.

113 *P. R.* 1907 and 43 *P. R.* 1889 *note*, distinguished.

... .. No. 118 *P. R.* 1916.

(16) ORDER 23, RULE 1.

Withdrawal of appeal in suit for declaration after death of alienor without express permission of Court to bring a fresh suit—bar to subsequent suit for possession.

Plaintiff, as collateral of her deceased husband, sued for the usual declaratory decree in respect of a mortgage made by Mussammatt K. K., a widow. The suit was dismissed by the Munsif on the ground that consideration and necessity had been proved. Plaintiff appealed to the Divisional Judge and during pendency of his appeal Mussammatt K. K. died, whereupon plaintiff prayed to be allowed to withdraw his appeal on the ground that he had now a fresh cause of action and could sue for possession. The Divisional Judge thereupon granted plaintiff's request to withdraw the appeal and dismissed it. Shortly after that plaintiff instituted the present suit for possession on the ground that the mortgage was effected for no necessary purpose and for no consideration.

Held, that permission to bring a fresh suit under order 23, rule 1 of the Code of Civil Procedure must be given in express terms and cannot be implied.

3 *P. R.* 1905 (p. 25), referred to.

Held also, that the present suit for possession was barred under order 23, rule 1.

8 *Indian Cases* 1066 and 28 *Indian Cases* 91, referred to.

I. L. R. 21 *Cal.* 265, 1 *P. R.* 1904 and 4 *Cal. W. N.* 110, distinguished

... .. No. 97 *P. R.* 1916.

(17) ORDER 34, RULE 14.

Explained.

See *Transfer of Property Act*, 1882 (3).

... .. No. 18 *P. R.* 1916.

CIVIL PROCEDURE CODE, V OF 1908—*concl'd.*

(18) ORDER 47, RULES 4 (2) AND 7 (1) (b).

No appeal against order passed on review, unless provisions of order 47 are contravened.

See *Dismissal for default.*

... .. No. 115 P. R. 1916.

(19) SCHEDULE II.

Court cannot submit whole proceedings for insolvency to arbitration.

See *Insolvency.*

... .. No. 50 P. R. 1916.

(20) SCHEDULE II, ARTICLE 12.

Court has no jurisdiction to make substantial modifications in an award beyond the limits laid down in article 12.

See *Arbitration* (3).

... .. No. 78 P. R. 1916.

(21) SCHEDULE II, RULE 16 (2).

Appeal or revision from decrees on awards of arbitrators—when admissible.

Held, that under Schedule II, rule 16 (2) of the Code of Civil Procedure no appeal lies from a decree purporting to follow an award of arbitrators except on the ground that it is not based on an award, that is in effect that the award is not a valid award but a nullity.

Held also, that the Chief Court *can* revise judgments or orders *against which no appeal lies* on the ground of material irregularity, *e. g.*, suppose a Court passed a decree on an award without giving time for objections ; but considering that the object of the law of arbitration is rapid finality, such a revisional power will be used very sparingly.

25 P. R. 1902 (P. C.), 88 P. R. 1902 (F. B.), 89 P. R. 1902 (F. B.), 1 P. R. 1908 (F. B.), 1 P. R. 1911, I. L. R. 38 Mad. 256, referred to.

114 P. L. R. 1914 and 78 P. L. R. 1913, distinguished.

25 Indian Cases 583, disapproved.

... .. No. 28 P. R. 1916.

COLLECTOR.

Making or refusing a reference under section 18, Land Acquisition Act, acts judicially.

See *Land Acquisition Act*, 1894.

... .. No. 67 P. R. 1916

COMPANIES (IN LIQUIDATION).

Court's power to order payment of debt due by a contributory.

See *Indian Companies Act*, 1882 (2).

... .. No. 36 P. R. 1916.

COSTS.

In Land Acquisition cases.

Held, that costs in matters under the Land Acquisition Act should be calculated in the same way as in ordinary suits.

I. L. R. 31 *Mad.* 328 and *C. A.* No. 144 of 1913 (unpublished), referred to.

... .. No. 126 P. R. 1916.

COURT-FEE.

(1). *Ad valorem* on appeal, where appellant objects That the decretal amount should not have been made realisable from certain properties.

Plaintiff obtained a money decree against defendant realizable from certain properties in defendant's possession. This decree was upheld on appeal by the Divisional Judge. Defendant preferred a second appeal to the Chief Court on a Rs. 10 stamp on the ground *inter alia* that the Courts below should only have passed a money decree.

Held, that the appeal must bear a Court-fee stamp *ad valorem* to the amount of the decree.

I. L. R. 10 *Mad.* 187 and *I. L. R.* 30 *Mad.* 93, referred to.

... .. No. 11 P. R. 1916.

(2). *On appeal in suit for land, where value of part of the subject-matter in appeal exceeds the value of the whole.*

The plaintiff, as nearest reversioner of S. K. and N. K., deceased, sued after the death of their respective widows to contest certain sales and mortgages effected by the widows. Part of the area included in one of the sales made in 1878 had been planted by the alienee with a wood and an orchard and the defendants pleaded that even if their sale was set aside they were still entitled to receive from the plaintiff a sum of Rs. 10,000 as the value of these improvements. Their right to the value of improvements was not contested but the value was disputed and fixed by the lower Court at Rs. 2,880. The defendants-appellants in their appeal urged *inter alia* that even if the sales were set aside they ought to be allowed a further sum of Rs. 5,000. Their Memo. of appeal however bore Court-fees only to cover the value of the land in suit which was less than Rs. 5,000.

Held, that in cases where the whole subject-matter of the suit is also the subject of the appeal, as in this case, the principle enunciated in 92 *P. R.* 1900 is correct, *viz.*, "that it was not contemplated by the legislature that the Court fee payable on part of a whole claim in appeal is "in the absence of express direction to the contrary to exceed the

COURT-FEE—*concl'd.*

"Court-fee payable on the whole claim" and that consequently the Court-fee on the present appeal was sufficient.

I. L. R. 36 *All.* 322, followed.

71 *P. R.* 1911 and 76 *P. R.* 1913, discussed.

19 *P. R.* 1908 (*F. B.*), referred to.

... .. No. 25 *P. R.* 1916.

COURT FEES ACT, 1870.

(1) SECTION 7 (*iv*) (*b*) AND SCHEDULE II, ARTICLE 17.

Court fee on appeal contesting mode of partition.

See *Partition*.

... .. No. 96 *P. R.* 1916.

(2) SECTION 7 (*iv*) (*c*).

Suit for cancellation of a will—Court-fee according to amount at which relief is valued.

See *Specific Relief Act*, 1877.

... .. No. 87 *P. R.* 1916.

(3) ARTICLE 17 (*vi*).

Court Fees on appeal from order setting aside an award of arbitrators.

See *Civil Procedure Code*, 1908 (7).

... .. No. 117 *P. R.* 1916.

CUSTOM (ADOPTION).

Brahmans of Mauza Nurpur, Tahsil Garshankar, District Hoshiarpur—collateral succession by adopted son—Hindu Law—Res judicata—nominal defendant in previous suit.

Held, that where a formal adoption has been made by a Brahman of Mauza Nurpur, Tahsil Garshankar, District Hoshiarpur, the adopted son succeeds collaterally in the adoptive family, and that the fact that the Brahmans of this village form a compact community and till land with their own hands does not constitute an adequate reason for holding that the institution of adoption among them has lost all religious significance.

Held also, that a decision arrived at in a previous suit cannot operate as *res judicata* against the person who was in that suit merely a nominal defendant.

60 *P. R.* 1894, 41 *P. R.* 1899 and *I. L. R.* 25 *Bom.* 589, referred to

... .. No. 65 *P. R.* 1916.

CUSTOM (ALIENATION).

(1) *Bhatti Rajputs of Mauza Kum, Tahsil Pind Dadan Khan—Muhammadian Law—reversion of donated property to donor's family in presence of sisters of last holder—consent of father to alienation—when not binding on son.*

Held, that in matters of succession Bhatti Rajputs of *Mauza Kum, Tahsil Pind Dadan Khan*, follow custom and not Muhammadian Law.

Held also, that the presence of sisters of the last holder of donated property does not prevent its reversion to the donor's family, notwithstanding that they are daughters of the original donee.

84 *P. R.* 1909, explained.

Held further, that the assent of the father of the plaintiffs to the alienation in dispute cannot be considered *bona fide*, so as to bind his descendants, where it was given merely because he wished the family to follow Muhammadian Law in future, after it had followed custom in the past.

59 *P. R.* 1904, 7 *P. R.* 1905, 35 *P. R.* 1907, 37 *P. R.* 1907, 78 *P. R.* 1908 and 68 *P. R.* 1912, distinguished.

... .. No. 4 *P. R.* 1916.

(2) *Adoption—status of daughter-in-law to challenge the adoption.*

Held, that under customary law a daughter-in-law of the adopter has no status to challenge the adoption.

63 *P. R.* 1912, 94 *P. R.* 1913 (p. 343) and 281 *P. L. R.* 1913, referred to.

68 *P. R.* 1903 (remark at p. 294), explained.

... .. No. 12 *P. R.* 1916.

(3) *Gift of ancestral land to daughter in presence of collaterals in third degree—Quraishi Sheikhs of Mauza Hardosheikh, Tahsil Phillour, district Jullundur—Muhammadian Law.*

In a suit brought by the collaterals of a sonless Quraishi proprietor of village Hardosheikh in *Tahsil Phillour* who were related to him in the third degree to contest a gift of ancestral property made by him to his daughter—

Held, that the Quraishi Sheikhs of the said *Mauza Hardosheikh*, are governed by custom and not by Muhammadian Law, but that the custom applicable would favour females to a greater extent than would the custom prevailing among indigenous Muhammadian tribes.

101 *P. R.* 1902 and 5 *P. R.* 1906, referred to.

Held also, that having regard to the fact that the Quraishis of this village are an endogamous tribe, that the donee is married to a collateral who is of the same degree of propinquity as the plaintiffs, that the only other permanent cultivators in the village are Arains among whom gifts to daughters are freely allowed, the onus of proving the

CUSTOM (ALIENATION)—*contd.*

validity of the gift of ancestral land which lay on the daughter was very light indeed and had been amply discharged.

... .. No. 19 P. R. 1916.

(4) *Gujars, Tahsil Phillour, District Jullundur—validity of gift of ancestral property by sonless proprietor to daughter and daughter's son in presence of near collaterals—Riwaj-i-am.*

Held, that by custom among Gujars of *Tahsil Phillour* in the *Jullundur District* a gift by a sonless proprietor of ancestral property to a daughter whose husband was a *khanadamaad* and to a daughter's son whom he had appointed as his heir is valid in the presence of near collaterals.

67 P. R. 1910, 2 P. R. 1901 and 50 P. R. 1893 (*P. B.*), distinguished.

... .. No. 29 P. R. 1916.

(5) *Status of a female to contest alienation by another female—Jat Sikhs of the Jullundur District.*

Held, that among the *Jat Sikhs* of the *Jullundur District* the *onus* of proving that a daughter has the right to contest an alienation by her mother of land, whereof the last male holder was her father, lies on the daughter and that on the record she has failed to discharge the *onus*.

5 P. R. 1895, 19 P. R. 1906, 72 P. R. 1906 and 60 P. R. 1910, distinguished.

61 P. R. 1906 and 13 P. R. 1912, approved.

... .. No. 33 P. R. 1916.

(6) *Will in favour of mother and mother's brother in presence of near collaterals—invalid—Gujars of Gujar Khan Tahsil.*

See *Punjab Limitation Act*, 1900 (2).

... .. No. 43 P. R. 1916.

(7) *Status of daughter to contest alienations by her mother or step-mother—Dhilon Jats, Ambala District—Res judicata—Civil Procedure Code, Act V of 1908, section 11—"former" suit—several suits decided at same time—strict interpretation.*

The plaintiff, a married daughter, on succeeding to her father's estate brought one consolidated suit to contest a large number of alienations made by her mother and step-mother but on the order of Subordinate Judge this original suit became 3, some of the alienations being retained in the original suit while others were excluded from it and formed the subject matter of 2 separate suits, all 3 suits were nevertheless decided by the District Judge by one judgment. One of them being of the jurisdictional value of the Rs. 295-5-0 only was taken in appeal to the Divisional Court, which on 14th July 1913 maintained the District Court's decree on the ground *inter alia* that 135 P. R. 1908 was authority for holding that the plaintiff had the right of challenge. This

CUSTOM (ALIENATION)—*contd.*

decision was not challenged in second appeal and it was urged for plaintiff that the question as to plaintiff's *status* to challenge the alienations was *res judicata* for the purposes of this first appeal to the Chief Court by reason of the decision of the first Court and that of the Divisional Court.

Held, that the rights and privileges of a female heir have to be decided on the evidence of each particular case and that plaintiff, a married daughter, who had succeeded to her father's estate had failed to prove that by custom among Dhillon Jats of the Ambala District, she had a right to contest alienations effected by her mother or step-mother.

Civil Appeals No. 1013, 1014 of 1909 (*F. B.*) (unpublished), referred to.

Held also, that the question of plaintiff's *status* to challenge the alienations was not *res judicata* by reason of either the decision of the first Court or that of the Divisional Court. Because as the decision of the first Court was given in all 3 suits in one judgment, *i. e.*, at the same time, it could not be held to have been given in a "former" suit within the meaning of section 11 of the Code of Civil Procedure and as regards the decision of the Divisional Judge on appeal, although it was a decision in a former suit, it was not a decision by a Court which was competent to deal with the present suit in appeal.

I. L. R. 27 *All.* 37 (*P. C.*), *I. L. R.* 24 *Mad.* 350, *I. L. R.* 33 *Cal.* 1101, *I. L. R.* 33 *All.* 51 (*F. B.*), *I. L. R.* 33 *All.* 151 and *I. L. R.* 32 *All.* 67, distinguished.

Held also, differing from 24 Indian Cases 243, that the Court referred to in section 11 of the Code is the original Court subject to the *proviso* that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal has been finally decided.

Held further, that legal provisions in bar of suit must be strictly interpreted in favour of a suit.

... .. No. 48 P. R. 1916.

(8) *Unrestricted power of Pathans of Mamanpur, Attock District—Wajib-ul-arz—Riwaj-i-am.*

Held, that by custom among Pathans of Mamanpur in the Attock District there is no restriction upon alienation by a male proprietor.

... .. No. 69 P. R. 1916.

(9) *Hindu Kalals of Mauza Alawalpur, district Jullundur—gift to daughter in presence of a brother—Hindu Law.*

Held, that there was no presumption that Hindu Kalals of Mauza Alawalpur who had carried on non-agricultural occupations for a long time and were not wholly dependent for their livelihood on agriculture were, in matters of alienation of landed property, governed by agricultural custom, and that no such custom had been proved in this case.

87 P. R. 1907, referred to.

CUSTOM (ALIENATION)—*contd.*

127 *P. L. R.* 1906 and Civil Appeal No. 371 of 1902 (unpublished), followed in 81 *P. R.* 1912, distinguished.

... .. No. 89 *P. R.* 1916.

(10) *Khojas of Chiniot, District Jhang—gift to wife—challenged by collaterals.*

Held, that the plaintiffs, collaterals, on whom the *onus* lay, had failed to prove the existence of a custom among Khojas of the town of Chiniot restricting the power of disposition of a male proprietor.

... .. No. 90 *P. R.* 1916.

(11) *After born son—whether bound by ratification by nearest collateral made after the son's birth.*

One H. sold a plot of land on 22nd August 1904. Plaintiff, a son of H. who was born on the 7th June 1905, sued for possession of it. One M., a cousin of H. who was in existence at the time of the sale, on the 20th July 1905 brought a suit for pre-emption in respect of the sale. It was contended by defendant-vendee that by this ratification by M. plaintiff had lost his rights.

Held, that plaintiff's right to challenge the sale was not affected by the ratification of M. as it took place "after" plaintiff's birth.

55 *P. R.* 1903 (*F. B.*), referred to.

... .. No. 105 *P. R.* 1916.

(12) *Will—Arains of Jullundur City—power of testation governed by same rules as power of gift—Muhammadan Law.*

Held, that the Arains being an agricultural tribe are presumably governed in matters of testamentary and intestate succession by the ordinary customary law and this presumption is not rebutted, though its force is weakened, by the fact that the ancestor of the family concerned and his descendants instead of adopting agriculture as their profession became employees of sorts in the Kapurthala State and other places.

Held also, that it is a well recognised principle of law that the power of alienation *inter vivos* and the power of testation go together, and that if in a particular case the former is proved to be governed by custom the latter is presumed to follow the same rule.

110 *P. R.* 1906 (*F. B.*), distinguished.

Held, accordingly on the evidence produced, that the parties are governed by custom in matters of alienations by will as well as by gift, in regard to both ancestral and self-acquired property.

... .. No. 122 *P. R.* 1916.

(13) *Gift by sonless proprietor of ancestral land to sister's son in presence of collaterals—Gujars of Jhelum Tahsil—onus probandi.*

Held, that the land in dispute, being ancestral, the initial *onus* was on the donee to prove that by custom among Gujars of the Jhelum

CUSTOM (ALIENATION)—*concl'd.*

Tahsil a childless proprietor had the power to make a gift of it in favour of his sister's son in presence of collaterals and that he had failed to discharge this *onus*.

102 P. R. 1893 and Customary Law of the Gujrat District by Capt. Davies, page 71, referred to.

... ..

No. 127 P. R. 1916.

CUSTOM (PRE-EMPTION).

Lahore City—Mohalla Rahmat Ullah Qureshi—value of evidence of existence of the custom in adjacent Mohallas and of previous cases in which vendee surrendered his bargain to the plaintiff-pre-emptor.

Held, that it had been proved that the custom of pre-emption exists in Mohalla Rahmat Ullah Qureshi, a sub-division of Lahore City.

Held also, that cases in which the vendee surrendered his bargain to the plaintiff-pre-emptor on receipt of the full price are not wholly devoid of value as precedents in favour of the existence of the custom of pre-emption.

17 P. R. 1895 (p. 67) per Chatterjee, J., disapproved—91 P. R. 1911 (p. 325), referred to.

Held further, that judgments shewing the existence of the custom in adjacent Mohallas, though they cannot by themselves prove the existence of the custom in the Mohalla itself, are relevant evidence of its existence in that Mohalla.

Authorities cited in remark 2 at p. 207 of Rattigan's Digest of Customary Law, referred.

... ..

No. 77 P. R. 1916.

CUSTOM (SUCCESSION).

(1) *Self-acquired property—Gaur Brahmins, tahsil Palwal, district Gurgaon—collaterals in third degree or daughter and her sons—Riwaj-i-am—weight of entry in—when opposed to general custom.*

Held, that the plaintiffs had failed to prove that by custom governing the Gaur Brahmins of the Palwal Tahsil, District Gurgaon, they, as collaterals in the third degree, had a preferential right of succession to a daughter and her sons in respect of self-acquired property.

Held also, that entries in a *Riwaj-i-am*, when opposed to the general custom, can carry very little weight unless supported by instances.

... ..

No. 7 P. R. 1916.

(2) *Widow's estate—Khatri Jagirdars of the Attock District—Hindu law—widow's status to challenge alienations made by her husband—instrument declaring that widow is only to receive maintenance—necessity of registration—Indian Registration Act, XVI of 1908, section 17.*

Held, that both under Hindu law and agricultural custom a widow is entitled to a life interest in her husband's estate and no special

CUSTOM (SUCCESSION)—*contd.*

family custom had been proved among these Khatri Jagirdars entitling her to maintenance only.

Held also, that a widow is not competent to challenge any disposition of property made by her husband.

135 P. R. 1908 and 17 P. R. 1913, referred to.

But held, that the document relied on in this case, made by the widow's husband and his brothers, which declared the right and interest of the brothers in estates of large value and also stated in one clause that their widows should not inherit a life estate but receive maintenance only of Rs. 25 per mensem, was not receivable in evidence as it had not been registered, and could not therefore affect the widow's right to a life interest.

No. 8 P. R. 1916,

(3) *Moveable property—self-acquired—brother or daughter—Rajputs of Garhshankar, Hoshiarpur District—moveable property acquired with income of ancestral property—Riwaj-i-am.*

Held, that by custom moveable property acquired with the income of the ancestral property must be regarded as self-acquired property.

Held also, that by custom a daughter is ordinarily preferred to a collateral in succession to self-acquired "immoveable" property.

2 P. R. 1909 and Rattigan's *Digest*, para. 23, referred to.

Held further, that the *onus* of proving that by custom among Rajputs of Garhshankar, District Hoshiarpur, a brother succeeds in preference to a daughter to self-acquired "moveable" property, was upon the former and that he had failed to discharge the *onus*.

Para. 45 of the *Riwaj-i-am* of 1884, referred to and distinguished.

No. 13 P. R. 1916,

(4) *Self-acquired property—Brahmans of Mauza Abbeipur, Thana Amb, Tahsil Una, District Hoshiarpur—daughters of collaterals—Riwaj-i-am.*

Held, that the *onus probandi* was on the collaterals to prove that by custom among Brahmans of *Tahsil Una* they had a preferential right of succession to self-acquired property to daughters and that they had failed to discharge the *onus*.

42 P. R. 1910 (P. C.), referred to.

No. 23 P. R. 1916,

(5) *Self-acquired property—Gil Jats of Mauza Lohara, Tahsil Zira, District Ferozepore—daughters and near collaterals—Riwaj-i-am—entry in, regarding succession to land, without discrimination between ancestral and self-acquired property.*

Held, that the plaintiffs, on whom the *onus* rested, had failed to prove that by custom among Gil Jats of *Mauza Lohara, Tahsil Zira*,

CUSTOM (SUCCESSION)—*contd.*

District Ferozepore, they, as near collaterals of a deceased sonless proprietor, succeeded to his self-acquired estate in preference to a daughter.

2 P. R. 1909, 25 P. R. 1912 and Rattigan's Digest para. 23, referred to.

Held also, that an entry in a *Riwaj-i-am* concerning succession to landed property, without discrimination between ancestral and self-acquired, must usually be held to refer only to ancestral property, particularly when the *Riwaj-i-am* was prepared more than 25 years ago, *i.e.* at a time when little attention was paid to the rights of daughters.

... .. No. 38 P. R. 1916.

(6) *Collateral succession by widow of adopted son—Brahmins, Kangra District.*

Held, that plaintiffs the widow of an adopted son, had failed to prove that by custom among Brahmins of the Kangra District she had any right to succeed as an heir to the collaterals of the adoptive father of her late husband.

... .. No. 44 P. R. 1916.

(7) *Of adopted son to property of his natural father in presence of collaterals—Banas, Tahsil Mukhtsar, District Ferozepore—Riwaj-i-am—Hindu law.*

Held, that an appointed heir retains his right to succeed in his natural family as against collaterals, though he does not succeed in presence of his natural brothers.

Rattigan's Digest of Customary Law, paragraph 48, referred to.

Entry in *Riwaj-i-am*, opposed to general custom and unsupported by instances held to be insufficient to prove the special custom alleged by the collaterals.

Held further, that even under Hindu Law mere customary appointment of an heir would not debar the adoptee from succeeding to the estates of his natural father.

... .. No. 45 P. R. 1916.

(8) *Non-ancestral land—daughters or collaterals—Jats of the Kharar Tahsil, Ambala District—onus probandi as to property being ancestral—res judicata.*

The plaintiffs, as daughters of one H., a Jat of *mauza* Rurki in the Kharar *Tahsil* of the Ambala District, claimed to succeed to their father's property. The defendants, collaterals in the 5th or 7th degree, alleged that the property was ancestral and that they were preferential heirs.

Held, that the *onus probandi* that the land was ancestral was on the defendants and that they had failed to discharge the *onus*.

Held also, that this question was not *res judicata* by reason of a previous suit brought by the collaterals to contest an alienation of the property made by H.'s widow for two reasons, *viz* :—

CUSTOM (SUCCESSION)—*contd.*

(a) because the matter was not put in issue and decided and a chance remark in the judgment could not be taken to be a decision, and

(b) because it was unnecessary to decide in an action contesting a widow's alienation whether the property was ancestral or not.

Held further, that the collaterals had failed to prove a special custom whereby daughters are excluded by collaterals in the matter of succession to non-ancestral property.

... .. No. 56 P. R. 1916.

(9) *Bhandari Khatri of Mauza Jalalabad, Amritsar District—Hindu law.*

Held, that the defendant-vendee on whom the initial *onus probandi* lay had proved the Bhandari Khatri of *Mauza Jalalabad* in the Amritsar District are, in the matter of succession, governed by the ordinary agricultural custom, and not by Hindu law.

60 P. R. 1895 and 107 P. R. 1901, distinguished.

... .. No. 61 P. R. 1916.

(10) *Ancestral and self-acquired immoveable property—Kapur Khatri, Tahsil Hafizabad, District Gujranwala—daughter or brother—Wajib-ul-arz—Riwaj-a-am—Hindu law.*

Held, that it had been proved that the Kapur Khatri of the Hafizabad *Tahsil* concerned in this suit are in matters of succession to immoveable property governed by custom and not by Hindu Law, and also that by that custom a daughter has no right to succeed as an heir to either the ancestral or the acquired immoveable property of her deceased father.

... .. No. 71 P. R. 1916.

(11) *Self-acquired property—daughter or collaterals—Jains of Buria, Tahsil Jagadhri, District Ambala—onus probandi.*

Held, that the plaintiff, a collateral in the sixth degree, on whom the *onus* lay, had failed to prove a custom among Jains of Buria by which he would succeed to self-acquired property in preference to a daughter.

... .. No. 74 P. R. 1916.

(12) *Bhutta Tarkhans of Multan City—Muhammadan law.*

Held, that it had not been proved that the parties, Bhutta Tarkhans, residents of Multan City, who do not own any agricultural land, are governed by agricultural custom and not by Muhammadan law.

47 P. R. 1900, referred to.

Held also, that a practice of the males excluding the females cannot be elevated to the dignity of a custom unless there is clear and cogent evidence that it has been uniform and has existed for a sufficiently long period.

... .. No. 84 P. R. 1916.

CUSTOM (SUCCESSION)—*contd.*

(13) *Heterogeneous proprietary body or sister—Jats, Garhi Kanungoyan, Garhshankar Tahsil, Hoshiarpur District—Riwaj-i-am.*

Held, that in a contest between a heterogenous proprietary body of the village and a sister in the succession to the property of a deceased childless Jat proprietor, without male collaterals, of Garhi Kanungoyan, *Tahsil* Garhshankar, District Hoshiarpur, the *onus* of proving a special custom entitling the proprietary body to exclude the sister was on the former and that they had failed to discharge that *onus*.

Held also, that the entry in the *Riwaj-i-am* of the settlement of 1885 in the answer of Jats to question 54, *viz.*, "no share is ever taken by the sister or sister's son" must be held to refer only to cases of succession in the presence of collaterals and had consequently no application to the present case.

136 *P. R.* 1884, 2 *P. R.* (*Rev.*) 1911, 28 *P. R.* 1904, 63 *P. R.* 1908 and 137 *P. R.* 1908, referred to.

... .. No. 85 *P. R.* 1916.

(14) *Ancestral property—Pathans of Kasba Shahabad, tahsil Thanesar, District Karnal—sister or collaterals in fifth degree—Riwaj-i-am.*

Held, that it had not been proved that the plaintiffs, a sister and sister's son, on whom the *onus* lay, had by custom among Pathans of *Kasba Shahabad, Tahsil* Thanesar, District Karnal, preferential rights of succession to the defendants, collaterals in the fifth degree, although the rights of daughters were well recognised and there was a *tendency* to regard sister and sisters' sons favourably and to prefer them to remote collaterals.

134 *P. R.* 1907 (*F. B.*), referred to.

Also Rattigan's Digest of Customary Law, paragraph 24 and the Customary Law of the Panipat *Tahsil* and Karnal *Pargana*, Karnal District, 1910, p. 19.

... .. No. 100 *P. R.* 1916.

(15) *By widow—collaterally—Pathans—Jullundur City.*

Held, that by custom among Pathans of Basti Mithu, a suburb of Jullundur City, the widow of a deceased proprietor is entitled to succeed to his collateral's estate in the same way as her deceased husband would have done if he had been living.

Authorities cited under paragraph 11, remark II of Rattigan's Digest of Customary Law, 8th edition, and 32 *P. R.* 1915, referred to, also 1 *P. R.* 1907 and 126 *P. R.* 1912 (*P. C.*).

77 *P. R.* 1893, dissented from.

... .. No. 121 *P. R.* 1916.

(16) *Widow's estate—Parachas of Makhad, Attock District—Muhammadan Law—presumption that widow, taking whole of her husband's estate, takes for life only.*

The parties concerned in the suit were Parachas of Makhad, a large village or small town on the Indus in the Attock District. They are

CUSTOM (SUCCESSION)—*concl'd.*

known as enterprising traders, travelling on business into Central Asia and other foreign places.

Held, that it had been proved that by custom prevailing among the Parachas concerned in the suit a widow only takes the usual life estate and no share under Muhammandan Law.

15 P. R. 1909 and 110 P. R. 1906 (F. B.), distinguished.

Held also, that in the Punjab where a widow takes the *whole* of her husband's estate there is a presumption that she takes only for life.

74 P. R. 1902 (p. 286), 54 P. R. 1903 (p. 219) and 14 P. R. 1911, referred to.

... .. No. 125 P. R. 1916.

CUSTOM (WILL).

In favour of mother in presence of near collaterals—invalid—Gujars of Gujar Khan *tahsil*, Rawalpindi district.

See *Punjab Limitation Act*, 1900 (2).

... .. No. 43 P. R. 1916.

D

DAMAGES.

In case for assault and battery—whether costs incurred in criminal prosecution can be included and whether amount of damages is a question of law or fact.

See *Torts*.

... .. No. 17 P. R. 1916.

DARZI MIR.

And *Darzi Mughal* are sub-divisions of a tribe of *Darzis*.

See *Punjab Pre-emption Act*, 1905 (2).

... .. No. 37 P. R. 1916.

DAUGHTER.

(1) Succession of—to self-acquired property in preference to collaterals—Brahmans of *thana* Amb, district Hoshiarpur—*Onus probandi*.

See *Custom (Succession)* (4).

... .. No. 23 P. R. 1916.

(2) Gift of ancestral property to—in presence of, near collaterals—Gujars, *tahsil* Phillour.

See *Custom (Alienation)* (1).

... .. No. 29 P. R. 1916.

DAUGHTERS—*concl'd.*

(3) Succession of—to self-acquired property—Gil Jats, *tahsil* Zira, district Ferozepore.

See *Custom (Succession)* (5).

... .. No. 38 P. R. 1916.

(4) Dhilon Jats—Ambala District—*status* of daughter to contest alienations by her mother.

See *Custom (Alienation)* (7).

... .. No. 48 P. R. 1916.

DAUGHTER-IN-LAW.

Has under custom no *status* to challenge an adoption made by her father-in-law.

See *Custom (Alienation)* (2).

... .. No. 12 P. R. 1916.

DEATH.

(1) Of one of the respondents in appeal—failure to bring his representatives on record—abatement *in toto*.

See *Abatement* (1).

... .. No. 3 P. R. 1916.

(1) Of party to suit—abatement—where application for substituting heirs is not made within time—sufficient cause for delay.

See *Civil Procedure Code*, 1908 (15).

... .. No. 118 P. R. 1916.

DECLARATORY SUIT.

(1) *By reversioners to contest alienation by a widow in presence of a nearer heir—status of plaintiffs to sue—contents of plaint—Sareen Khatri of Lahore—Hindu Law.*

* One C. R., a Sareen Khatri of Lahore, died leaving a widow, a daughter and a son of the daughter who was a minor. These three together sold a house which formed part of C. R.'s estate; and the plaintiffs as reversionary heirs of C. R. sued for a declaration that the sale was invalid. It was found that the parties were governed by Hindu law by which the daughter's son was the nearest heir after his mother's death. The question for decision was whether the plaintiffs had any *locus standi* to bring this suit.

Held, that the principles applicable to the case were those laid down by their Lordships of the Privy Council in *I. L. R. 6 Cal. 764* (at pages 772 and 773), and the decision turned upon whether the daughter's son in the present case had precluded himself by his *own act or conduct* from suing or had *colluded with the widow* or *concurred* in the act alleged to be wrongful. As the daughter's son was a minor at the date of the alienation and was still a minor at the date of suit the

DECLARATORY SUIT—*concl'd.*

answer to the question must be in the negative, and the plaintiffs were consequently not entitled to the declaration prayed for.

Held also, that according to the principles laid down by their Lordships in the case aforesaid the plaintiffs as the more distant reversionary heirs of C. R. should have stated in their plaint the circumstances under which they claimed to sue in the presence of the nearest reversionary heir, and upon a plaint so framed the Court should have exercised its judicial discretion in determining whether the more remote reversioners were entitled to sue or not after considering *inter alia*, on the one hand, whether plaintiffs' chances of succession were so remote that no declaration should be granted to them and on the other hand, whether the declaration if made would serve the purpose of perpetuating testimony for whomsoever might happen to be the next reversioner on the death of the widow.

119 *P. R.* 1901 (pages 412 and 413), 149 *P. R.* 1908, *I. L. R.* 34 *All.* 207; 18 *Indian Cases* 212, *I. L. R.* 32 *Cal.* 62 and *I. L. R.* 28 *Mad.* 57, referred to.

... .. No. 60 *P. R.* 1916.

(2) Plaintiff must shew that his rights are threatened.

See *Second Appeal* (4).

... .. No. 63 *P. R.* 1916.

(3) In respect of a will *after* death of testator—not competent.

See *Specific Relief Act*, 1877.

... .. No. 87 *P. R.* 1916.

(4) *For removal of a mahant and declaration the plaintiff has the right to nominate a successor—consequential relief.*

Plaintiff sued to have the defendant, who claimed under the will of the late *mahant* and who had taken possession, removed and to have it declared that he, plaintiff, as a spiritual relation of the late *mahant* and as *mahant* of the parent shrine had the right to nominate a new *mahant*. It was objected *inter alia* that the suit in its present form did not lie as a suit for possession could be brought.

Held, following 56 *P. R.* 1895 that as the prayer for removal of defendant *from the office* did not necessarily imply his *physical dis-possession* and that all that was sought was a decree which would enable the successor, on appointment, to enforce his own right to take possession of the property, the suit as laid was competent.

I. L. R. 15 *Mad.* 15, *I. L. R.* 16 *Mad.* 31 and *I. L. R.* 22 *Mad.* 117, not followed.

... .. No. 95 *P. R.* 1916.

DECREE.

Order recognising an abatement by reason of no application having been made in time to bring legal representatives of a deceased plaintiff on the record, is not a decree.

See *Abatement* (3).

... .. No. 128 P. R. 1916 (F. B.).

DEPUTY COMMISSIONER.

Orders of—under Punjab Alienation of Land Act—cannot be interfered with by Civil Court.

See *Punjab Pre-emption Act*, 1913 (1).

... .. No. 124 P. R. 1916.

DHILON JATS.

Ambala District—*status* of daughter to contest alienations by her mother.

See *Custom (Alienation)* (7).

... .. No. 48 P. R. 1916.

DISMISSAL FOR DEFAULT.

Restoration—whether case should proceed where it left off—waiver of objection—review—whether appeal lies from order accepting review—Civil Procedure Code, Act V of 1908, order 47, rules 4 (2) and 7 (1) (b)—Revision—order passed without jurisdiction.

Held, per Johnstone, C. J., that where a reference to arbitration has been made by the Court at request of parties and, before the award was put in, the suit was dismissed in default and on application the case had been restored and no objection was made in the first Court to the continuation of the arbitration proceedings, an objection that these proceedings came to an end on dismissal of the suit should not be entertained by the Appellate Court.

Held also, per Johnstone, C. J., that there is much to be said for the view that when a case is restored after dismissal by default it does not become *res integra* but is again before the Court in the condition in which it was at the time of dismissal.

Held per curiam, where the lower Appellate Court had first decided that the dismissal in default had not rendered the pending arbitration proceedings null and void and subsequently on review took the contrary view and was "of opinion that the application for review "should be granted," that having regard to the wide discretion given by order 47, rule 4 (2) of the Code of Civil Procedure it was impossible to hold that that Court acted in contravention of rule 4 and consequently no appeal was competent under rule 7 (1) (b).

11 P. R. 1913 and 3 I. Ap. 221; I. L. R. 2 Cal. 131 (P. C.), referred to.

24 W. R. 166 and 25 W. R. 324, distinguished.

DISMISSAL FOR DEFAULT—*concl'd.*

Held, however, that as the award of the arbitrator made subsequent to the restoration of the suit was a legal award on the principle set out in the submitting order, the lower Appellate Court exercised a jurisdiction not vested in it by law in setting it aside in its order on review and that the latter order was, consequently, open to revision by the Chief Court.

... .. No. 115 P. R. 1916.

DIVORCE.

Suit for—jurisdiction of District Court, where parties last lived together, &c.

See *Indian Divorce Act*, 1869.

... .. No. 76 P. R. 1916 (F. B.).

E

EQUITABLE MORTGAGE.

By deposit of title-deeds—effective in Punjab.

See *Mortgage* (2).

... .. No. 31 P. R. 1916.

EVIDENCE.

To prove a custom of pre-emption—previous cases compromised—judgments regarding custom in adjoining Mohallas.

See *Custom (Pre-emption)*.

... .. No. 77 P. R. 1916.

EXECUTION.

Of decree—Judgment-debtor under money decree not debarred from alienating his property.

See *Punjab Alienation of Land Act*, 1900 (1).

... .. No. 39 P. R. 1916.

EXECUTION PROCEEDINGS.

Under ex-parte decree—whether revived by subsequent decree on the merits.

Held, that applications and proceedings in execution under an *ex-parte* decree become null and void when the *ex-parte* decree is set aside and are not revived when the decree on the merits is passed.

I. L. R. 29 Mad. 175, referred to.

... .. No. 103 P. R. 1916.

EX-PARTE DECREE.

Whether execution proceedings under—are revived by subsequent decree on merits.

See *Execution Proceedings*—

... .. **No 103 P. R. 1916.**

F**FEMALES.**

Only those expressly recognised by *Mitakshara* Hindu Law are heirs.

See *Hindu Law* (5).

... .. **No 51 P. R. 1916.**

FRAUD.

Whether person in possession of the property sold *benami* can set up his own fraud.

See *Benami Sale*.

... .. **No. 21 P. R. 1916.**

G**GIFT.**

Reversion of gifted property to donor's family, in presence of sisters of last holder.

See *Custom (Alienation)* (1).

... .. **No. 4 P. R. 1916.**

GIL JATS.

Tahsil Zira, district Ferozepore—daughter succeeds to self-acquired property in preference to near collaterals.

See *Custom (Succession)* (5).

... .. **No. 38 P. R. 1916.**

GOVERNMENT TENANTS (PUNJAB) ACT, 1893.

Government grant of land—status of widow of Abadkar, who after death of her husband acquired proprietary rights in the holding.

In 1896 one U. S. was granted by Government *Abadkar* rights in certain lands comprised in square No. 55-56 situate in Chak 64, Jhang Branch. U. S. died in 1898 leaving a widow and a daughter. In 1899 mutation was effected in favour of the widow and in 1903 she was granted occupancy rights. In 1912 she paid the necessary money and acquired full proprietary rights in these lands and then made over the property to her daughter.

GOVERNMENT TENANTS (PUNJAB) ACT, 1893—*concl'd.*

Held, that the land was, under these circumstances, the self-acquired property of the widow and that the collaterals of her deceased husband had no *status* to challenge the alienation made by her in favour of her daughter.

8 *P. R.* 1915 and Civil Appeals No. 1256 of 1906 and 869 of 1908 (unpublished), referred to.

... .. No. 129 P. R. 1916.

GUARDIANS.

Muhammadan—*de facto* guardian cannot alienate minor's property.

See *Indian Limitation Act*, 1908 (8).

... .. No. 83 P. R. 1916.

GUARDIANS AND WARDS ACT, 1890.

SECTION 30.

Duty of minors suing to avoid an alienation by guardian not expressly allowed by Court.

One Mussammat Haidri Begam in 1904 and 1905 on behalf of herself and as guardian of her two sons and daughter mortgaged her deceased husband's property to plaintiff agreeing to pay interest at 9 per cent. per annum. The plaintiff sued for recovery of the mortgage-money and obtained a decree for Rs. 3,100 principal and Rs. 2,156-3 interest and costs against the defendants and the property under mortgage. The minor sons and daughter appealed to the Chief Court.

Held, that under section 30 of the Guardians and Wards Act the alienation was merely voidable at the instance of the minors and although it was correct that the District Judge in sanctioning the raising of a loan by the widow did not expressly mention the rate of interest to be allowed, the minors could not be granted their prayer, without, on their part, restoring all benefits which they had received under their guardian's contract, *i. e.*, they must restore the principal amount and also reasonable interest, and that 9 per cent. per annum was reasonable interest.

Held also, that although the term in the 1904 mortgage was four years the lower Court was entitled to allow interest after due date by way of compensation or damages for at least six years after that date and that 9 per cent. per annum was reasonable compensation.

I. L. R. 19 *All.* 39 (*P. C.*), referred to.

... .. No. 24 P. R. 1916.

GUJARARS.

(1). Jullundur district—gift to daughter of ancestral property in presence of near collaterals.

See *Custom (Alienation)* (4).

... .. No. 29 P. R. 1916.

GUJARS—*concl'd.*

(2). Gujar Khan *tahsil*, Rawalpindi district—will in favour of mother invalid in presence of near collaterals.

See *Punjab Limitation Act*, 1900 (2).

... .. No. 43 P. R. 1916.

(3). Of Jhelum *tahsil*—gift of ancestral property by sonless proprietor to sister's son—not valid.

See *Custom (Alienation)* (13).

... .. No. 127 P. R. 1916.

H

HINDU LAW.

(1). A widow is entitled to a life interest in her husband's estate by Hindu Law as well as by custom.

See *Custom (Succession)* (2).

... .. No. 8 P. R. 1916.

(2). *Marriage—solemnized in Sangat year—validity of—in absence of consent of guardian—mother's right to select a husband for her daughter—marriage effected in disregard of direction of Court not to affect a marriage without its sanction.*

Held, that a marriage between Hindus is not invalid merely because it was solemnized in a *Sangat* year which may be regarded inauspicious by the astrologers.

Held also, that in the event of the father and paternal male relations having, by death or waiver, lost their right to give a female infant in marriage the right of selecting a husband for her devolves upon the mother and she is competent to give her in marriage.

Held also, that the fact that the mother was appointed guardian by the District Court with the direction that she should not perform the marriage of her minor daughter without the sanction in the Court and that notwithstanding this the mother effected the marriage without obtaining such sanction would not invalidate a marriage which was otherwise legally contracted.

I. L. R. 22 Bom. 509, referred to.

Held further, that the rules of Hindu Law as to the duty of giving in marriage are directory and not mandatory and that of the absence of force or fraud, a Hindu marriage, otherwise legally contracted and performed with the necessary ceremonies, is not invalidated by the absence of consent of the guardian entitled to give such consent.

I. L. R. 14 Mad. 316, *I. L. R.* 19 All. 515, *I. L. R.* 22 Bom. 812, referred to.

64 P. R. 1884, distinguished.

... .. No. 20 P. R. 1916

HINDU LAW—*contd.*

(3). *Aroras*—alienation by widow—status of reversioners to contest the same in presence of a daughter.

Held, that the late husband's reversioners may sue for the usual declaration in respect of an alienation effected by the widow notwithstanding the existence of a daughter of the deceased.

149 P. R. 1908, followed.

249 P. W. R. 1912 (F. B.), distinguished.

... .. No. 27 P. R. 1916.

(4). Mere customary adoption does not debar adopted son from succeeding in his natural family even by Hindu Law.

See *Custom (Succession)* (7).

... .. No. 45 P. R. 1916. ✓

(5). *Mitakshara*—whether daughters of father's brother of last male owner is entitled to inherit the latter's property in absence of all heirs.

Held, that according to the Benares School of Hindu Law females do not succeed to males unless their right of inheritance is expressly recognised by some text in their favour, and the females so recognised are (1) the widow ; (2) the daughter ; (3) the mother ; (4) the father's mother ; and (5) the father's father's mother.

Held consequently, that according to the *Mitakshara* system the plaintiff, a daughter of the deceased male owner's uncle had no possible claim to succeed as his heir notwithstanding that there were no other heirs to inherit his property.

I. L. R. 16 Cal. 367, 20 P. R. 1906, *Mayne's Hindu Law* (8th edition), p. 748 *Trevelyan's Hindu Law* (1912) p. 350 and *Mulla's Hindu Law*, p. 132, referred to.

I. L. R. 22 All. 338, not approved, as dissented from in *I. L. R.* 28 All. 307.

... .. No. 51 P. R. 1916.

(6). Apostacy of one member of a joint Hindu family *ipso facto* separates him from the co-parcenary.

See *Apostacy*.

... .. No 57 P. R. 1916.

(7). *Joint family*—liability of sons for debts incurred by their father, a business man with debts who spent money extravagantly for immoral purposes and drink—inference of immorality.

This was a suit by the mortgagees for recovery of principal and interest due on 8 mortgage deeds charging the same properties in each deed and made by one J. N., since deceased, whose 2 sons and a grandson were sued as surviving members of the joint Hindu family

HINDU LAW—*contd.*

represented by J. N. It was pleaded by defendants that the late J. N. was a drunkard and addicted to debauchery, &c. It was found as a fact by the Chief Court that the mortgaged property was under the circumstances of the case ancestral property and further that J. N. did lead an irregular life and spent extravagantly on wine and women, that on the other hand he expended large sums in litigation and encountered heavy losses in business, that his debts, immoral and moral, were inextricably entangled and that it was impossible to determine how much was moral and how much immoral, that though the plaintiffs were aware of J. N.'s weakness there was no sound basis for holding that they could distinguish between his proper and his improper necessities.

Held, that the inference of immorality spoken of in 50 P. R. 1913 to be drawn in cases in which *as a fact* all proper debts had been defrayed from other monies than those in respect of which the suit is brought is applicable only where the debtor had no debts or business on which the loans might have been expended with propriety.

Held, also that the general rule no doubt is that some clear connection between the debt and the immorality must be established, but that it does not follow that every debt of an immoral individual is an immoral debt.

Held, consequently, on the facts found (*vide supra*), that the defendants were liable for the amount of mortgage money actually proved to have passed together with interest thereon.

... .. No. 58 P. R. 1916.

(8) Suit for declaration by collaterals in presence of daughter's son—whether competent.

See *Declaratory Suit* (1).

... .. No. 60 P. R. 1916.

(9) Hindu Kalals of *Munzu* Alawalpur, District Jullundur—governed by—

See *Custom (Alienation)* (9).

... .. No. 89 P. F. 1916.

(10) Construction of will—absolute bequest with gift over in case of death of legatee.

See *Will* (2).

... .. No. 114 P. R. 1916.

(11) *Adoption—not revocable—will—disposing mind—testator suffering from plague—proper amount of maintenance of widow, and right of residence.*

Held, that an adoption once validly made cannot be revoked subsequently.

HINDU LAW—concl'd.

Held also, that it was unlikely that a person suffering from a virulent type of plague (from which he died within 3 days from the date of the will) had sufficient mental capacity to comprehend the extent of his estate and the nature of the claims of those whom he was excluding from all participation in the property, and that his will was consequently invalid.

Held further, that a Hindu widow is entitled to a suitable residence and also to a fixed recurring sum for her maintenance and that in fixing the amount of maintenance provision must be made for her reasonable wants, namely for the purpose of charities and the discharge of religious obligations in addition to a reasonable provision for her food, raiment and lodging, having regard to the amount of the estate which is liable for her maintenance, her position in life and the circumstances of the family.

... .. No. 123 P. R. 1916.

HYPOTHEC.

Oral charge on moveable property, effective in Punjab.

See *Mortgage* (3).

... .. No. 32 P. R. 1916.

I

INDIAN COMPANIES ACT, 1882.

(1) SECTION 136.

Leave of Court to proceed with revision—proceedings against decree in favour of a plaintiff Bank which went into liquidation during pendency of the revision.

The People's Bank of India "Limited" sued the present petitioner for a certain sum due by him and obtained a decree which was upheld on appeal. Petitioner then filed a revision in the Chief Court and pending determination of his petition the Bank became insolvent and an order was passed by the District Judge for its winding up through the Court.

The question then arose whether petitioner could proceed with his revision without the sanction of the Court under section 136 of the Indian Companies Act. It was urged for petitioner that it was not but him the Bank, who was plaintiff in the suit, and that consequently he was not proceeding against the Company.

Held, that the revision proceeding against the decree obtained by the Company was a proceeding "against the Company" within the meaning of section 136 of the Companies Act, and could consequently not be proceeded with without the leave of the Court.

... .. No. 91 P. R. 1901.

INDIAN COMPANIES ACT, 1882—*concl'd.*

(2) SECTION 150.

(corresponding to section 186 of the new Act, VII of 1913)—*Companies in liquidation—power of Court in winding-up proceedings to order payment of a debt due by a contributory—when to be exercised.*

Held, that the Court in winding-up proceedings is, under section 150 of the Indian Companies Act, 1882, empowered to call upon a contributory to pay to the liquidator a debt due by him to the Company on a pro-note.

59 P. R. 1915 and 4 Ch. Ap. 475, referred to.

Held also, that although the jurisdiction of the Court is permissive, it should not be declined when a case is made out for the exercise thereof, unless very cogent reasons to the contrary are shewn.

... .. No 36 P. R. 1916.

INDIAN CONTRACT ACT, 1872.

(1) SECTION 134.

Responsibility of surety where plaintiff withdrew his claim against the representatives of the deceased principal who according to the pleas of defendants (including the surety) was a minor at time of contract.

Plaintiffs sued for recovery of a sum of money on the allegations that N. was indebted to him to that extent on a *bahi* account, that N. had died and that defendants 1—6 were his legal representatives and that P. S., defendant No. 7, had stood surety for the due payment of the money. The defendants pleaded *inter alia* that N. at the time of the contract was a minor and plaintiff subsequently withdrew his claim against N.'s legal representatives and elected to proceed only against P. S., the surety. The lower Courts dismissed the claim against him on the ground that as plaintiff had by his conduct discharged the legal representatives of the principal debtor from liability the surety was equally discharged under section 134 of the Contract Act.

Held, that these grounds were untenable for two reasons—

(1) as P. S. having himself subscribed to the written statement filed by N.'s legal representatives must himself be taken to have urged the non-liability of the latter and that it was therefore with his implied assent that they were discharged from liability, and

(2) where the original agreement is void as in the case of a minor's contract in India, the surety is liable as a principal debtor.

Pollock and Mulla's Indian Contract Act, page 378, referred to.

... .. No. 54 P. R. 1916.

(2) SECTION 254 (5) AND (6).

Cause of action for dissolution of partnership—jurisdiction.

See *Jurisdiction (Civil)* (2).

... .. No. 42 P. R. 1913.

INDIAN DIVORCE ACT, 1869.

SECTION 3 (1), (2), (3) AND SECTION 10.

Jurisdiction of District Court—"where husband and wife reside or last resided together."

Held that, having regard to the definition of "High Court," "District Judge," and "District Court," given in section 3 of the Indian Divorce Act, the District Court of Ambala had no jurisdiction in a case for dissolution of marriage where the petitioner and his wife last lived and cohabited together at Bangalore and where the wife at the time of institution of the proceedings was apparently living in Calcutta and was certainly not residing, dwelling or present at any place within the Punjab.

... .. No. 76 P. R. 1916 (F B.).

INDIAN EVIDENCE ACT, 1872.

SECTION 91.

Admissibility of oral evidence to prove payment of consideration.

See *Indian Registration Act*, 1908 (3).

... .. No. 98 P. R. 1916.

INDIAN LIMITATION ACT, 1877.

SECTION 26.

Presumed dedication of a road to the public.

See *Punjab Municipal Act*, 1911 (1) and (2).

... .. Nos. 108 & 109 P. R. 1916.

INDIAN LIMITATION ACT, 1908.

(1) SECTION 5.

Discretionary power of Appellate Court to grant or refuse extension of time—whether interfered with on second appeal.

Held, that where a lower Appellate Court has considered the matter carefully and come to the conclusion that no case has been made out for extending the period of limitation under section 5 of the Limitation Act, the Chief Court will not interfere with its order in second appeal.

I. L. R. 26 All. 327 and *I. L. R.* 25 Mad. 166, referred to.

... .. No. 92 P. R. 1916.

(2) SECTIONS 5 AND 12.

Sufficient cause for delay in presenting an appeal—period during which copies can be applied for.

On the 5th October 1915 appellant presented an appeal to the Chief Court against the judgment of the Additional District Judge of Ferozepore, dated 2nd July 1915, i.e., on the 95th day excluding the day of

INDIAN LIMITATION ACT, 1908—*contd.*

delivery of judgment. The appellant did not apply for copy until the 1st October (the 30th September being a holiday) and received it on the 4th October.

Held, that the appeal was filed too late, being presented on the 91st day (excluding the 4 days spent in obtaining a copy) and that no allowance of time was by law admissible because 30th September was a holiday.

I. L. R. 25 *Bom.* 584 and *I. L. R.* 25 *Bom.* 586, referred to.

Held also, that indulgence under section 5 of the Limitation Act on the ground of a mistake is only allowed where it is shewn that the appellant has acted with due care and diligence.

... .. **No. 79 P. R. 1916.**

(3) SECTION 5 AND ARTICLE 152.

Limitation for appeal to District Court—sufficient cause for not presenting appeal in time.

See *Punjab Courts Act*, 1914 (2).

... .. **No. 88 P. R. 1916.**

(4) SECTION 6 AND ARTICLE 164.

Period to set aside *ex-parte* decree cannot be extended by reason of minority.

See *Punjab Courts Act*, 1914 (9).

... .. **No. 101 P. R. 1916.**

(5) SECTIONS 14 AND 19.

Acknowledgment of subsisting liability in pleadings—extension of time spent in previous proceedings—due diligence.

Held, that where defendants had in written pleadings in a previous case admitted the fact that they had received Rs. 1,000 as earnest money from the plaintiffs but stated that the sum had been more than repaid by delivery of cotton to the value of Rs. 3,000 it was not an admission of a *subsisting* liability as to the Rs. 1,000 within the meaning of section 19 of the Indian Limitation Act.

I. L. R. 20 *Mad.* 239, 25 *Mad. L. J.* 261 and *I. L. R.* 18 *All.* 385, *per Edge, C. J.*, referred to.

I. L. R. 33 *Cal.* 1047 (*P. C.*), distinguished.

Held also, that a person who claims under section 14 of the Act an exclusion of time during which a former proceeding was pending must prove two things—*first* that he had prosecuted the former proceeding with due diligence and *secondly* that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature and that in this case the plaintiffs could not be said to have prosecuted the previous proceedings with due diligence and that under

INDIAN LIMITATION ACT, 1908—*contd.*

these circumstances it was unnecessary to consider whether non-joinder of parties comes within the purview of *explanation III* of the section.

19 *P. R.* 1888, referred to.

... .. **No. 41 *P. R.* 1916.**

(6) SECTION 28 AND SCHEDULE I.

The schedule does not apply to defences, and under section 28 it must be shewn that the defendant has been out of possession for a period exceeding that which the law would allow him for bringing a suit to recover possession.

See *Res judicata* (1).

... .. **No. 1 *P. R.* 1916.**

(7) ARTICLES 14 AND 120.

Limitation—suit for declaration of title to share in shamilat instituted more than a year after Revenue Officer rejected application for partition.

Held, that a suit for a declaration of title to a proportionate share of the *shamilat* area after a Revenue Officer had rejected plaintiff's application for partition of the *shamilat*, is governed by article 120 and not by article 14 of the Limitation Act.

11 *P. W. R.* 1908, 8 *All. W. N.* 119 and 9 *Cal. L. J.* 91, referred to.

... .. **No. 47 *P. R.* 1916.**

(8) ARTICLES 44, 91 AND 144.

Alienation by major brother of his minor brothers' shares in land—suit by latter to recover their shares—limitation—guardianship—Muhammadian Law—de facto guardian.

Held, that under Muhammadian Law a brother is not a guardian of the property of his minor brothers and that the latter can consequently on attaining majority treat any alienation of their land by their brother as a nullity and a suit to recover possession of it is governed by article 144 and not by article 44 or article 91 of the Limitation Act.

73 *P. R.* 1890 (*F. B.*), 28 *P. R.* 1909, 15 *P. R.* 1913 and *I. L. R.* 32 *All.* 392, referred to.

57 *P. R.* 1891 and 19 *P. R.* 1902, distinguished.

Held also, that it is now a firmly established proposition of law that article 91 is restricted to a suit between the parties to the instrument or their successors in interest and that a plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor in title.

23 *P. R.* 1904 must be held to have been overruled by *I. L. R.* 34 *All.* 213 (*P. C.*).

INDIAN LIMITATION ACT, 1908—*contd.*

Held further, that the situation of an unauthorised guardian is not bettered by describing him as a *de facto* guardian.

I. L. R. 34 *All.* 213 (*P. C.*), referred to.

... ..

No. 83 P. R. 1916.

(9) ARTICLES 64 AND 85.

Punjab Loans Limitation Act, I of 1904—limitation—suit on balance struck—novation.

The dealings between the parties began about the beginning of 1905 and balances were struck in May, July and November 1905. The plaintiff sued in February 1911 for the balance due. The dealings between the parties were of various kinds, entries had to be made sometimes to defendants' debit, sometimes to their credit—accounts were kept by plaintiffs only.

Held, that a mere acknowledgment of a debt is neither an account stated nor is it evidence of a new contract.

I. L. R. 23 *All.* 502, 3 *P. R.* 1878 (*F. B.*) and 68 *P. R.* 1904, referred to.

Held also, that the words *baqi deone* at the end of the balance struck did not make it a new contract.

119 *P. R.* 1908 and *I. L. R.* 8 *Bom.* 405, referred to.

Held, therefore, that the suit was governed by article 85 of the Limitation Act and not by article 44 and the Punjab Loans Limitation Act, and was consequently barred by time.

I. L. R. 10 *Mad.* 199, referred to.

... ..

No. 16 P. R. 1916.

(10) ARTICLES 120 AND 125.

Limitation for suit by remote reversioner to contest alienation by a widow—applicability of Punjab Limitation Act, I of 1900.

Held, that the Punjab Limitation Act, I of 1900, is not applicable to suits in which the alienation challenged has been made by a woman.

33 *P. R.* 1911 (*F. B.*), referred to.

Held also, that the article of the Indian Limitation Act applicable to a suit for a declaration in respect of a widow's alienation is article 125, where the plaintiffs are immediate reversioners, and article 120 where they are remote reversioners.

I. L. R. 22 *All.* 33 (*F. B.*), referred to.

... ..

No. 15 P. R. 1916

INDIAN LIMITATION ACT, 1908—*concl'd.*

(11) ARTICLES 142 AND 127.

Limitation for suit for share in joint Hindu family property after plaintiff became a convert to Muhammadanism.

See *Apostacy*.

... .. No. 57 P. R. 1916.

(12) ARTICLE 144.

Possession of trespassers—whether adverse ab initio to all descendants of common ancestor of last owner and plaintiff.

In 1875 one B. got the land of his wife's former husband, D., mutated in his name, he having no right to it whatever. D. S., the nearest collateral of D., died on 10th December 1903 and his sons brought the present suit on 4th July 1914 to recover the land, *i. e.*, within 12 years of their father's death.

Held, following 106 P. R. 1906, that the possession of B., not being a person who obtained possession by virtue of an alienation but a mere trespasser, had been adverse *ab initio* to all descendants of the common ancestor of D. and the plaintiffs, and that the suit was consequently barred by limitation under article 144 of the Indian Limitation Act.

18 P. R. 1895 (F. B.) and 26 P. R. 1911 (F. B.), distinguished.

... .. No. 113 P. R. 1916.

INDIAN REGISTRATION ACT, III OF 1877.

(1) SECTION 17 (b).

Registration of documents evidencing a partition—whether admissible for collateral purpose.

Held, that the documents produced in this case for the purpose of proving a partition were, taken together, a non-testamentary document extinguishing the right of plaintiff in certain immoveable property exceeding Rs. 100 in value *inter alia* and acknowledging receipt of other property in lieu of his relinquishment and were, consequently, not receivable in evidence for want of registration.

Held also, that these documents could not be looked at in this case for possession of the immoveable property they purported to dispose of for any purpose whatsoever.

17 *Mad. L. J. R.* 469 and 3 *Mad. L. T.* 187, referred to.

25 *W. R.* 211 and 6 *Mad. L. T.* 192, distinguished.

... .. No. 35 P. R. 1916.

(2) SECTION 48.

Not applicable to mortgage by deposit of title-deeds.

See *Mortgage* (2).

... .. No. 31 P. R. 1916.

INDIAN REGISTRATION ACT, XVI OF 1908.

(1) SECTION 17.

A document declaring the rights and interests of several brothers in large estates and also that their widows were only to receive maintenance, not receivable in evidence without registration.

See *Custom (Succession)* (2).

No. 8 P. R. 1916.

(2) SECTION 17.

Unregistered document transferring half share in a lease of a coal mine and also certain moveable property, plant, etc., in consideration of Rs. 12,500—whether receivable in evidence in regard to the moveable property—collateral purpose.

Defendant No. 2 had obtained from Government a lease of a coal mine for 15 years and in consideration of an advance of Rs. 12,500 transferred to plaintiff one-half share in the lease and also certain moveable property including plant, etc., by a written document whereby it was agreed *inter alia* that if certain representations made by defendant 2 to the plaintiff in regard to the quality of the coal, etc., proved incorrect plaintiff could terminate the arrangement and would be entitled to recover the Rs. 12,500 with interest and that if repayment was not made, he could both sell the moveable property and continue as joint lessee until the advance was recovered and even dispose of his share in the lease of the mine in order to recoup himself. This document was not registered. Subsequently defendant No. 1 attached part of the moveable property conveyed to plaintiff in execution of a decree against defendant No. 2 and thereon plaintiff instituted the present suit for a declaration that the property in question is not liable to attachment or sale.

Held, that as the written document embodied one transaction for one consideration and there was no separate or distinct transaction concerning the moveable property it was not receivable in evidence, being unregistered, even in regard to the moveable property.

68 P. R. 1886, followed.

I. L. R. 15 *Mad.* 336 (341), referred to.

Held also, that there is a clear difference between the use of a document for a collateral purpose and its use to establish directly title in a part of the property conveyed.

4 *Bom. L. R.* 883 and 9 *Bom. L. R.* 393, distinguished.

No. 49 P. R. 1916.

(3) SECTION 17 (1) (b) (c).

Registration—agreement to sell and execute sale-deed and acknowledgment of earnest money—oral evidence to prove payment—Indian Evidence Act, I of 1872, section 91.

INDIAN REGISTRATION ACT, XVI OF 1908—*concl'd.*

Held, that a document which speaks of the sale-deed being completed afterwards and the remaining purchase-money being paid at the time of its completion is really only an agreement to sell by means of a regular deed notwithstanding that it says at the beginning that a sale has taken place, and that such a document does not require registration as coming under section 17 (1) (b) of the Registration Act.

184 P. R. 1889 (F. B.), referred to.

Held also, that although a receipt for the Rs. 600 earnest money included in the document would require registration under section 17 (1) (c), that did not affect the agreement part of it as the two were separable, and oral evidence of the payment was admissible under section 91 of the Evidence Act.

73 P. L. R. 1910 and I. L. R. 4 Bom. 126 (F. B.), referred to.

... .. No. 98 P. R. 1916.

(4) SECTION 48.

Preference of registered document over oral gift where possession is with mortgagees.

Held, that an oral gift of land which is in possession of mortgagees, and possession of which could consequently not be delivered to the donees, is of no avail as against a subsequent transfer effected by a registered document.

10 P. R. 1900, referred to.

I. L. R. 9 Mad. 267 and P. L. R. of 1900, p. 131, distinguished.

... .. No. 30 P. R. 1916.

INSOLVENCY.

Whether Court can refer the proceedings to arbitrators—Provincial Insolvency Act, III of 1907, section 47—Civil Procedure Code, Act V of 1908, Schedule II.

Held, that notwithstanding section 47 of the Provincial Insolvency Act the provisions of Schedule II of the Code of Civil Procedure are inapplicable to proceedings under that Act and the Court had therefore no power to refer the whole proceedings to arbitrators to decide whether the petitioner should or should not be declared an insolvent.

88 P. R. 1887, per Plowden, J., referred to.

... .. No. 50 P. R. 1916.

INTEREST.

Whether chargeable after due date of a mortgage in absence of express agreement.

See *Mortgage* (1).

... .. No. 5 P. R. 1916.

J

JAINS.

Tahsil Jagadhri—succession—self-acquired property—daughter preferred to collaterals.

See *Custom (Succession)* (11).

... .. No. 74 P. R. 1916.

JATS.

Sikhs, Jullundur District—*status* of female to contest alienation by another female.

See *Custom (Alienation)* (5).

... .. No. 33 P. R. 1916.

JOINT HINDU FAMILY.

(1) Conversion of one of the members to Muhammadanism *ipso facto* separates him from the co-parcenary.

See *Apostacy*.

... .. No. 57 P. R. 1916.

(2) Liability of sons for debts incurred by their father, a business man with debts, who spent money extravagantly for immoral purposes.

See *Hindu Law* (7).

... .. No. 58 P. R. 1916.

JURISDICTION (CIVIL).

(1) *Civil Procedure Code, Act V of 1908, section 20 (c)*—*Pro-note not expressly payable at Delhi but delivered there to the payee—presumption of its being payable there—Jurisdiction of Delhi Court.*

The plaintiff sued at Delhi for recovery of money due on a promissory note in her favour executed by the defendant at Fatehgarh in the United Provinces and sent by him from that place to plaintiff at Delhi where she had her residence and where it was accepted by her in settlement of her claim against defendant. The pro-note did not expressly prescribe any place for its performance.

Held, that the defendant by delivering the pro-note at Delhi impliedly promised to pay the money at that place which view was supported by circumstances and some of the evidence on the record and consequently the Delhi Court had jurisdiction to try the suit—*vide* section 20, clause (c) of the Code of Civil Procedure.

1 *Beng. L. R.* 35, distinguished.

1 *Mad. H. C. R.* 202, referred to.

... .. No. 2 P. R. 1916.

JURISDICTION (CIVIL)—*concl'd.*

(2) *Suit for dissolution of partnership business carried on in the Jammu State while parties' ancestral home was in the Gurdaspur District, where part of the capital had been subscribed—Indian Contract Act, IX of 1872, section 254 (5) and (6).*

Plaintiff and defendant, both of whom had their ancestral home in the Gurdaspur District, entered into a partnership to carry on a shop at Ramkot in the Jammu State. Plaintiff alleging that owing to malversation on the part of defendant it was impossible to carry on the business at a profit, sued at Gurdaspur for dissolution of partnership and rendition of accounts. Part of the capital required to start the partnership was subscribed in the Gurdaspur District.

Held, that as the causes of action, *viz.*, misconduct of his partner and the fact that the business could only be carried on at a loss (*vide* sub-sections 5 and 6 of section 254 of the Indian Contract Act) arose wholly at Ramkot in the Jammu State, the Gurdaspur Court had not jurisdiction to entertain the suit, notwithstanding that part of the capital was subscribed within the limits of its jurisdiction.

Woodroffe and Amir Ali's Civil Procedure Code, pp. 176—180, referred to.

... .. No. 42 P. R. 1916.

(3) Of District Court to entertain suit for divorce—where parties last lived together, &c.

See *Indian Divorce Act*, 1869.

... .. No. 76 P. R. 1916 (F. B.).

(4) Court acts without—if it makes substantial modifications in an award beyond the limits laid down in article 12, schedule II of the Code of Civil Procedure.

See *Arbitration* (3).

... .. No. 78 P. R. 1916.

(5) Of Judge, who heard the case, to write judgment after his transfer.

See *Civil Procedure Code*, 1908 (13).

... .. No. 80 P. R. 1916.

(6) In suit for damages for breach of contract of betrothal—where contract was made—what Appellate Court should do where case was tried by a subordinate Court not having jurisdiction.

See *Civil Procedure Code*, 1908 (5).

... .. No. 93 P. R. 1916.

JURISDICTION OF CIVIL COURT.

Civil Court cannot entertain plea of mortgagors in possession that they are occupancy tenants.

See *Punjab Tenancy Act*, 1887 (1).

... .. No. 59 P. R. 1916.

K

KALALS.

Of *Mauza Alawalpur*, District *Jullundur*—no presumption that they are governed by agricultural custom—no custom proved.

See *Custom (Alienation)* (9).

... .. No. 89 P. R. 1916.

KHATRIS.

(1) *Jagirdars of Attock District*—position of widow.

See *Custom (Succession)* (2).

... .. No. 8 P. R. 1916.

(2) *Bhandaris—Mauza Jalalabad, Amritsar District*—governed by custom in matters of succession.

See *Custom (Succession)* (9).

... .. No. 61 P. R. 1916.

(3) Of *Hafizabad Tahsil* governed by custom, by which daughter is excluded from inheritance even in regard to self-acquired immoveable property.

See *Custom (Succession)* (10).

... .. No. 71 P. R. 1916.

KHOJAS.

Of *Chiniot town*—no custom proved, restricting power of alienation.

See *Custom (Alienation)* (10).

... .. No. 90 P. R. 1916.

L

LAHORE CITY.

Custom of pre-emption exists in *Mohalla Rahmat-ullah Qureshi*.

See *Custom (Pre-emption)*.

... .. No. 77 P. R. 1916.

LAND ACQUISITION ACT, 1894.

SECTION 18.

Application to Collector to refer matter to Court—what it should contain in regard to grounds on which objection is taken—Collector acts judicially and his orders are subject to revision by Chief Court.

Held, that a Collector making a reference or refusing to make a reference under section 18 of the *Land Acquisition Act* is acting

LAND ACQUISITION ACT, 1894—*concl'd.*

judicially, and his proceedings are therefore subject to revision by the Chief Court.

Held also, that if in his application an owner says "I object to the award of the Collector and I wish a reference to be made to the Court" and then adds in connection with one item of the property that the compensation paid for the different classes of land is very low and also adds in connection with another item of the property that the compensation for the wells and other buildings is too low, *he does give grounds* for the reference within the meaning of section 18 (2) of the Act.

I. L. R. 30 *Bom.* 275, disapproved in this respect.

No. 67 P. R. 1916.

LIMITATION.

(1) For suit by remote reversioner to contest alienation made by a widow.

See *Indian Limitation Act*, 1908 (10).

No. 15 P. R. 1916.

(2) For suit for amount due on an account in which a balance has been struck.

See *Indian Limitation Act*, 1908 (9).

No. 16 P. R. 1916.

(3) Acknowledgment in pleading—must be of *subsisting* liability—exemption of time spent in previous proceedings—due diligence.

See *Indian Limitation Act*, 1908 (5).

No. 41 P. R. 1916.

(4) For declaratory suit brought after Revenue Officer has rejected application for partition.

See *Indian Limitation Act*, 1908 (7).

No. 47 P. R. 1916.

(5) Application for copies must be made within period of limitation.

See *Indian Limitation Act*, 1908 (2).

No. 79 P. R. 1916.

(6) For suit by Muhammadans to recover their property alienated by their major brother during plaintiff's minority.

See *Indian Limitation Act*, 1908 (8).

No. 83 P. R. 1916.

LIMITATION ACT.

See *Indian Limitation Act* and *Punjab Limitation Act*.

M

MARRIAGE.

(1) Validity of Hindu marriage effected by mother of the girl in a *Sangat* year against Court's orders.

See *Hindu Law* (2).

... .. No. 20 P. R. 1916

(2) *Restitution of conjugal rights—discretionary power of Courts, when not to be exercised.*

Held, that the grant of a decree for restitution of conjugal rights is discretionary with the Courts.

And where, as in this case, the girl was a minor at the time of marriage and no consummation had taken place and the husband had allowed her to remain with her parents for at least 8 years after she attained puberty, *Held* that the Lower Appellate Court was right in declining to exercise its discretionary jurisdiction.

215 *P. L. R.* 1912, 82 *P. R.* 1908 and 11 *Moo. I. A.* 551, referred to.

... .. No. 46 P. R. 1916

(3) Among Muhammadans—social inequality—breach of anti-nuptial stipulations—whether ground for dissolving marriage.

See *Muhammadan Law* (5).

... .. No. 119 P. R. 1916

MARSHALLING.

Doctrine of—not applicable where puisne mortgagee had notice of other mortgage.

See *Mortgage* (7).

... .. No. 86 P. R. 1916

MAXIMS.

Nemo allegans turpitudinem suam audiendus est.

In pari delicto portior est conditio possidentis.

See *Benami Sale*.

... .. No. 21 P. R. 1916

MINORITY.

Not a ground for extending period for application to set aside an *ex parte* decree.

See *Punjab Courts Act*, 1914 (9).

... .. No. 101 P. R. 1916

MINORS.

(1) Suing to avoid unauthorised alienation by their guardian, must restore all benefits they have received under the alienation.

See *Guardians and Wards Act*, 1890.

... .. No. 24 P. R. 1916.

(2) Contract by—void—surety liable as a principal.

See *Indian Contract Act*, 1872 (1).

.. ... No. 54 P. R. 1916.

MORTGAGE.

(1) *Interest after due date—whether chargeable in absence of express agreement.*

Held, that in the absence of a covenant that interest should cease to run after expiry of the stipulated period, the creditor should ordinarily be allowed interest at the rate specified in the deed for the entire period during which the mortgage remains unpaid.

77 P. R. 1898, followed.

114 P. R. 1901, distinguished.

I. L. R. 20 All. 171 (P. C.) and *I. L. R.* 19 All. 39 (49) (P. C.), referred to.

... .. No. 5 P. R. 1916.

(2) *By deposit of title-deeds—effective in the Punjab as against subsequent mortgage by registered deed with or without notice—title-deeds include copies where originals were lost—presumption of intention to keep previous rights alive—Indian Registration Act, III of 1877, section 48—not applicable.*

The plaintiff Bank sued to enforce their rights as mortgagees against the defendants 1 and 2, the mortgagors, and the mortgaged property, a house named "Chor View," under a registered mortgage deed dated 12th November 1907—defendant 3, the present appellant was impleaded as she claimed to have a prior equitable mortgage on the house by deposit of title-deeds—plaintiff urged:—

(1) that the so-called title-deeds were in fact no title-deeds at all but merely attested copies of the original deeds and that as such their deposit could not create a mortgage in Mrs. Stewart's favour, and

(2) that it was never intended that the deposit should have the effect of a mortgage or charge upon the property.

Held, as to (1) that this plea could not be raised for the first time in appeal, but also that title-deeds include "copies" of the deeds when the originals are not forthcoming.

Gour's Transfer of Property Act (3rd edition), p. 715, citing *Ex-parte Broadbent*, 1 M. and A., p. 635, referred to.

MORTGAGE—*contd.*

Held, as to (2) on the facts that the title-deeds were deposited with appellant with the intention of creating a mortgage charge in her favour over the property in suit.

Also that in accepting a subsequent written mortgage the ordinary presumption would be that she intended to keep the first mortgage alive for all purposes beneficial to herself.

Held, further, that in those parts of British India where the Transfer of Property Act, 1882, is not in force a valid mortgage can be created by deposit of title-deeds.

9 *Moo. I. A.* 307, *I. L. R.* 17 *All.* 252 (260) per Burkitt, J., *I. L. R.* 14 *Bom.* 269 and Ghose's *Law of Mortgage* (4th edition), p. 151 *et seq.*, referred to.

And there being no difference in this country between *equitable* and *legal* estates, that such a mortgage has as extensive an operation as a mortgage or charge created by a registered deed and consequently the question of notice, actual or constructive, of the previous mortgage by deposit of title-deeds, which exists in England, does not arise in the Punjab and section 48 of the Registration Act does not apply.

I. L. R. 31 *Cal.* 57 (72) (*P. C.*), *I. L. R.* 11 *Cal.* 158, *I. L. R.* 33 *Cal.* 410, 14 *Burma L. R.* 211, Ghose's *Law of Mortgage* (aforesaid) and Shephard and Brown's Commentaries on "*Transfer of Property Act*" (7th edition), p. 255, referred to.

... .. No. 31 P. R. 1916.

(3) *Hypothec*—oral charge on moveable property in Punjab effective as against subsequent written mortgage.

The plaintiff Bank sued to enforce their claim on an unregistered deed of mortgage of the machines, types, plants printing presses, printing materials, apparatus, &c., also the good will, furniture, fixtures, fittings and appurtenances, &c., belonging to a press. The defendant-appellant relied on a previous oral charge or *hypothec* of these properties made in her favour to secure advances made by her.

Held, that in the Punjab a charge of this kind in respect of moveable property could be made without any deed in writing and if made orally it was as effectual (except in cases provided for by section 48 of the Indian Registration Act) as if it were effected by an instrument in writing.

Held consequently, that the defendant's oral charge being prior in time must prevail over the rights of the plaintiff Bank under its written deed and also that the question of notice did not arise.

11 *Indian Cases* 869, referred to.

... .. No. 32 P. R. 1916.

(4) *Failure of payment of part of consideration*—incomplete transaction—effect on mortgagee's rights—*Transfer of Property Act*, IV of 1882, section 58.

MORTGAGE—*contd.*

Held, that the definition of a mortgage given in section 58 of the Transfer of Property Act, *viz.*, that a mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to pecuniary liability, should be adopted in the Punjab and should be given its full logical effect.

Held consequently, that in the absence of a covenant or stipulation to the contrary a mortgage is complete or in other words the "transfer of interest" is effected, not when the consideration for it is paid or made good, but when the mortgage contract is entered into, regardless of whether and when the consideration is paid or made good.

Held also, that the covenant or stipulation to the contrary may be express or implied, the question in such cases always being "when did the parties intend that the transfer of interest should take place?" The presumption would be in favour of immediate transfer, but this presumption could be rebutted by proof of an express stipulation to the contrary or by proof of facts and circumstances from which such contrary intention might reasonably be inferred.

Held further, that the transfer of interest when complete in accordance with the views above stated cannot be rescinded.

And a mortgage of which the whole consideration has not been paid is valid to the extent of the money advanced unless the mortgagor has expressly put an end to the mortgage.

19 *Indian Cases* 676 (*All.*) and *I. L. R.* 34 *All.* 273, distinguished.

10 *Indian Cases* 258 (*Mad.*), *I. L. R.* 32 *Mad.* 281 and *I. L. R.* 35 *Mad.* 114 and 18 *Indian Cases* 610 (*Mad.*).

I. L. R. 29 *Bom.* 46 and *I. L. R.* 31 *Bom.* 552, and

10 *Cal. W. N.* 932 and *I. L. R.* 35 *Cal.* 1051, referred to.

132 *P. R.* 1879 and 55 *P. R.* 1911, referred to.

16 *P. R.* 1884, 103 *P. R.* 1906, *C. Rev.* 355 of 1906 per Chitty, J. (unpublished), 26 *P. W. R.* 1908, 66 *P. R.* 1912, 67 *P. R.* 1914, and 31 *P. R.* 1911, commented on and approved generally.

153 *P. R.* 1882, 100 *P. R.* 1889, 1900 *P. L. R.* 401 and 59 *P. R.* 1907 (*F. B.*), disapproved.

... .. No. 53 *P. R.* 1916 (*F. B.*).

(5) In suit for redemption Civil Court cannot take cognisance of mortgagors' plea that they were occupancy tenants of the land under mortgage and that plaintiff could not therefore get physical possession.

See *Punjab Tenancy Act*, 1887 (1).

MORTGAGE—*contd.*

(6) *Payable by instalments and also repayable 90 days after demand—rights of mortgagee in regard to unpaid instalment and in regard to recovery of whole mortgage debt.*

The plaintiff Bank sued on 16th April 1914 for the recovery of the whole amount due under a mortgage deed dated 14th November 1912 for Rs. 15,000 which was to be repaid by 5 annual instalments of Rs. 3,000 each, beginning on the 1st January 1914. Defendant-mortgagor had failed to pay the first instalment. The deed contained a provision that the mortgagor will, 90 days after demand, pay to the Bank or its assigns the amount for the time being owing by the mortgagor to the Bank in account to be made up with interest and all other legal charges.

Held, that under the terms of the mortgage deed the Bank was entitled to sue for the amount of each unpaid instalment as soon as it fell due and that the provision (cited above) conferred on the Bank the further right to call up the whole amount of the debt, whenever it thought fit and whether or no there had been any default on the part of the mortgagor, 90 days after demand.

But held also, that as there had been no final demand for the payment of the whole debt 90 days before the institution of the suit, a decree could only be passed for Rs. 3,000 the amount of the unpaid instalment *plus* interest thereon—notwithstanding that defendant in not paying the instalment had failed to carry out the terms of the mortgage contract.

I. L. R. 26 Bom. 24, distinguished.

... ..

No. 62 P. R. 1916.

(7) *Marshalling—Transfer of Property Act, IV of 1882, section 81—suit by first mortgagee without impleading second mortgagee—whether latter's rights are thereby affected and whether a second suit lies to determine the rights of the mortgagees inter se—Civil Procedure Code, Act V of 1908, order 2, rule 2—right of puisne mortgagee to redeem the prior mortgage.*

The plaintiff R. D. held a mortgage on 4 houses which had fallen to B. D., the mortgagor, on partition of joint properties—subsequently B. D., mortgaged two of the 4 houses to K. C.—R. D. then instituted a suit for the recovery of his debt without impleading K. C. and obtained a decree, in execution of which he attached the 2 houses. K. C. subsequently objected to the attachment and was successful, with the result that R. D. brought the present suit for a declaration to contest the validity of the order passed in execution.

Held, that as the puisne mortgagee K. C. had notice of the previous mortgage to R. D. the doctrine of marshalling did not apply, *vide* section 81 of the Transfer of Property Act.

Held also, that K. C. was a necessary party to R. D.'s suit for recovery of his debt and as he was not impleaded he was entitled to treat the decree passed behind his back as a nullity so far as he was concerned, and his rights remained unaffected by the decree and the proceedings in execution thereof.

MORTGAGE—concl'd.

Held also, that neither under order 2, rule 2 of the Code of Civil Procedure nor by any other principle of law was R. D. debarred from bringing another suit with the object of getting the full benefit of his security.

I. L. R. 23 *All.* 1 and cases therein cited at p. 3, referred to.

Held further, that K. C.'s right as puisne mortgagee, not being affected by R. D.'s previous suit, was what he could have claimed if he had been a party to that suit, *viz.*, the right to redeem the prior mortgage with view to enforcing his own mortgage and that the right of the two mortgagees *inter se* could be decided in the present suit.

I. L. R. 26 *Mad.* 537 and *I. L. R.* 28 *Bom.* 153, referred to.

... .. **No. 86 P. R. 1916.**

(8) *Failure to deposit redemption money within time fixed in decree of Lower Appellate Court—whether bar to second appeal—mortgagee in possession—failure to keep accounts of expenditure.*

Held, that failure to deposit the redemption money within the time fixed in the Lower Appellate Court's decree does not necessarily bar the hearing of a second appeal in the Chief Court.

101 *P. R.* 1890, referred to.

I. L. R. 23 *All.* 88, *I. L. R.* 31 *All.* 328 and *I. L. R.* 23 *Mad.* 521, distinguished.

Held also, that failure on the part of the mortgagee in possession to keep accounts of expenditure does not *ipso facto* defeat a claim to compensation which is proved in other ways, although all presumptions will in that case be made in favour of the mortgagor.

... .. **No. 99 P. R. 1916**

MUHAMMADAN LAW.

(1). Rajputs of *Mauza Kum, Tahsil Pind Dadan Khan*, follow custom and not Muhammadan Law in matters of succession.

See *Custom (Alienation)* (1).

... .. **No. 4 P. R. 1916.**

(2). *Quraishi Sheikhs of Mauza Hardosheikh, Tahsil Phillour*, District Jullundur, are governed by custom and not by Muhammadan Law.

See *Custom (Alienation)* (3).

... .. **No. 19 P. R. 1916.**

(3). Alienation of minor's property by major brother—nullity.

See *Indian Limitation Act*, 1908 (8).

... .. **No. 33 P. R. 1916.**

MUHAMMADAN LAW—*concl'd.*

(4). *Tarkhans* of Multan City, governed by—

See *Custom (Succession)* (12).

No. 84 P. R. 1916.

(5). *Marriage—Sayad woman with a man of another tribe—whether invalid—among Sunnis or Shias—ante-nuptial stipulation and breach of.*

Held, that although equality in *nasab* (family or descent) is one of the 6 requisites laid down by the jurists of the *Hanafi* school of Muhammadan Law it is a moot point of the *Sunni* law whether a marriage otherwise lawfully contracted by an adult woman can be or must be set aside by a Civil Court in British India at the instance of the so-called guardians (that is of the relatives who would be guardians if the woman had been a minor) if they can prove such social inequality on the part of the bridegroom, as would injuriously affect the family credit or interest.

But that the doctrine of the *Shia* law is clear that social inferiority on the part of the husband affords no ground for the cancellation of the marriage. *Radd-ul-Muhtar*, Vol. II, p. 529, referred to.

Held also, that in the absence of fraud a girl not *sui juris*, given in marriage by her father, cannot avoid the marriage merely on the ground of the husband's social inequality, *i.e.*, that his tribe is socially inferior to that of his wife.

Amir Ali's Muhammadan Law, third Edition, Volume II, p. 408, and Baillie's Digest of Muhammadan Law, p. 70, referred to.

1 Agra *H. C. R.* 130, distinguished.

Held consequently, that inferiority in the social status of the husband does not render such a marriage invalid *ab initio* nor does it justify a Court in dissolving the nuptial tie.

Held further, that as regards ante-nuptial stipulations the law appears to be that when a marriage contract is entered into subject to an essential condition of a reasonable nature, not opposed to the policy of the Muhammadan Law, the Court may set aside the marriage on the breach of that condition, unless the condition has been waived or the breach thereof acquiesced in by or on behalf of the wife.

No. 119 P. R. 1916.

(6). *Parachas* of Makhad, Attock District—traders—governed by custom in matters of succession and not by Muhammadan Law.

See *Custom (Succession)* (16).

No. 125 P. R. 1916.

MUNICIPAL COMMITTEE.

(1). When Courts will interfere with exercise of their powers.

See *Punjab Municipal Act*, 1911 (4).

No. 75 F R. 1916

MUNICIPAL COMMITTEE—*concl'd.*

(2). Whether suit to challenge action of—is competent.

See *Punjab Municipal Act*, 1911 (3).

... .. No. 104 P. R. 1916.

0

OCCUPANCY RIGHTS.

Sale of—to landlord—not open to a claim for pre-emption.

See *Pre-emption* (5).

... .. No. 116 P. R. 1916.

ONUS PROBANDI.

As to land being ancestral, in dispute between daughters and collaterals.

See *Custom (Succession)* (8).

... .. No. 56 P. R. 1916.

P

PARACHAS.

Of Makhad, Attock District—traders—governed by custom in matters of succession.

See *Custom (Succession)* (16).

... .. No. 125 P. R. 1916.

PARTITION.

Suit for—Court fees on appeal contesting mode of partition—Court Fees Act, VII of 1870, section 7 (iv) (b) and schedule II, article 17—proper mode of partition where parties are in separate possession of joint houses.

The suit was by one co-sharer against 4 co-sharers for possession by partition of certain joint land, the *jama* of the whole being Rs. 345-7-2. Plaintiff alleged that the family house property had been already divided up. The Court decided that the suit could not proceed unless the house property was included. The house and garden were valued at some Rs. 46,000. The lower Court passed a preliminary decree fixing the shares of the parties and then appointed a Commissioner and ordered that "the separate pieces of immoveable property shall be "auctioned by the Commissioner among the parties, the share-holders "being allowed to bid. The total sum thus paid in will be divided "among the parties in the proportionate shares given above." One of the defendants then appealed to the Chief Court objecting to the mode of partition.

Held, that the stamp of Rs. 10 on the appeal was sufficient under article 17 (vi), schedule II of the Court Fees Act.

28 P. R. 1903, distinguished.

PARTITION—*concl'd.*

Held also, that as the five co-sharers were in possession of various parcels of the house property, some having more and some less than their share, the ordinary mode of partition should be adopted, *viz.*, to allot to each sharer houses approximately of the value of his or her share, at the same time respecting as far as possible previous actual possession, and to have any small excess or deficiency made good by money payments.

... .. No. 96 P. R. 1916.

PATHANS.

(1) Attock district—no restriction on alienation.

See *Custom (Alienation)* (8).

... .. No. 69 P. R. 1916.

(2) Tehsil Thaneer, Karnal district—collaterals in 5th degree exclude sisters, in succession to ancestral property.

See *Custom (Succession)* (14).

... .. No. 100 P. R. 1916.

(3) Jullundur City—collateral succession by widow.

See *Custom (Succession)* (15).

... .. No. 121 P. R. 1916.

PLAINT.

By several plaintiffs claiming in the alternative.

See *Civil Procedure Code*, 1908 (11).

... .. No. 10 P. R. 1916.

PRE-EMPTION.

(1) *Sale disguised as a gift—Evidence of its being a sale.*

The deed of transfer in respect of which pre-emption was sought, was in terms one of gift and according to these terms the gift (which comprised 12 *kanals* 2 *marlas* of land in *Mauza B*) was made by N. as some return for the services rendered to him at various times by his near kinsman and very good friend C. D., and the deed also stated that the value of the property was Rs. 1,000. It was found, as a matter of fact, that C. D. was not in any way related to N. to whom he was in no way proved to be beholden, that N. had 6 sons of his own and was on good terms with them and that he was by no means a man of superfluous wealth—both the lower Courts found that the transfer was really one of sale.

Held, that on the facts found the lower Courts were fully justified in holding that the transfer was really one of sale, though disguised as a gift.

117 P. R. 1890 (*F. B.*), followed.

... .. No. 70 P. R. 1916

PRE-EMPTION—*contd.*

(2) *Joint decree in favour of rival pre-emptors—one to succeed after the other, if latter failed to pay decretal amount into Court on a certain date—whether payment to vendee out of Court by that date, but not certified till later, is sufficient compliance with decree.*

Two rival pre-emptors F. A. and A. F. secured a joint decree for pre-emption, the rights of F. A. being preferred to those of A. F. Under the decree F. A. had to pay the price into Court by the 15th March 1915 and in default his claim was to stand dismissed and then A. F.'s claim was to come in. On 5th March F. A. put in a receipt for the price and asked that payment be certified. The Court then issued notice to the judgment-debtors to appear and fixed 25th March for hearing. On 25th March, as notices had not been served, the 12th April was fixed. On 31st March a number of judgment-debtors appeared and confirmed the receipt and on the 12th April some more appeared and also confirmed the receipt.

Held, that as the payment to the judgment-debtors by F. A. had not been certified in Court by the 15th March 1915 it could not be considered equivalent to payment into Court by that date and that consequently F. A.'s claim stood dismissed on the 16th March and the decree in favour of A. F. came into force.

21 *P. R.* 1889, distinguished and explained.

... .. No. 73 *P. R.* 1916.

(3) Custom of—exists in Mohalla Rahmat-ullah Qureshi, Lahore City.

See *Custom (Pre-emption)*.

... .. No. 77 *P. R.* 1916.

(4) *Rival pre-emptors—consent to sale by one set of pre-emptors—complete waiver—proof of consent.*

Held, that consent to the sale by one set of rival pre-emptors is a complete waiver and lets in any rival pre-emptor who may come forward.

42 *P. R.* 1878, referred to.

Held also, that the consent in this case had been sufficiently established by one of the set aforesaid having attested the deed of sale and joined in the registration, by that set suing together and after another pre-emptor had instituted his suit, and by the direct evidence of witnesses, etc.

25 *P. R.* 1903 and 48 *P. R.* 1912, referred to.

100 *P. R.* 1885, 7 *P. R.* 1912 and 139 *P. R.* 1894, distinguished.

... .. No. 106 *P. R.* 1916.

(5) *On sale of occupancy rights under section 6 or 8 of the Punjab Tenancy Act, 1887, to the landlord.*

PRE-EMPTION—*concl'd.*

Held, that plaintiffs, as collaterals of the vendor, have no right of pre-emption against the landlord vendees who have purchased occupancy rights from their tenant, the vendor, and that this is so, even though the said rights come under section 3 and section 8 of the Punjab Tenancy Act, and not under section 5.

31 *P. R.* 1896 (*F. B.*), 24 *P. R.* 1902 (*F. B.*), 19 *P. L. R.* 1907 and 73 *P. R.* 1911, referred to.

36 *P. R.* 1912, disapproved.

... .. **No. 116 P. R. 1916.**

(6) Not competent in respect of a sale sanctioned by Deputy Commissioner under Punjab Alienation of Land Act.

See *Punjab Pre-emption Act*, 1913 (1).

... .. **No. 124 P. R. 1916.**

(7) Effect of Local Government notification on decree of pre-emption during pendency of appeal.

See *Civil Procedure Code*, 1908 (10).

... .. **No. 130 P. R. 1916.**

PRINCIPAL AND AGENT.

Agent has no *status* to appeal against a decision adverse to his principal and himself where the former has withdrawn from the contest.

See *Appeal (Civil)* (3).

... .. **No. 26 P. R. 1916.**

PRIVY COUNCIL.

Certificate for appeal to—where Chief Court agreed with findings of facts of lower Court on which a point of limitation was decided.

See *Civil Procedure Code*, 1908 (9).

... .. **No. 64 P. R. 1916.**

PRO-NOTE.

Where payable, when the note does not expressly prescribe a place of payment.

See *Jurisdiction (Civil)* (1).

... .. **No. 2 P. R. 1916.**

PROVINCIAL INSOLVENCY ACT, 1907.

(1) SECTIONS 4 (b) AND 46 (1).

Revision by Chief Court confined to questions of law—whether question of "intention" with which a transfer of property has been made is one of law or fact.

PROVINCIAL INSOLVENCY ACT, 1907—*concl'd.*

Held, that the Chief Court cannot interfere, under section 46 (1) of the Provincial Insolvency Act, with an order, made by the District Court in appeal, unless it finds that some question of law has been wrongly decided.

I. L. R. 16 *All.* 476 (*F. B.*), *I. L. R.* 27 *All.* 192 and *I. L. R.* 21 *Bom.* 250, referred to.

Held also, that the question as to whether a person made a transfer of his property with intent to defeat or delay his creditors, *vide* section 4 (b) of the Insolvency Act, is not one of law but merely one of fact.

I. L. R. 20 *Cal.* 93 (99) (*P. C.*), 2 *Cal. W. N.* 335 (336), *I. L. R.* 7 *Ch. Ap.* 302, 3 *Cal. W. N.* 255 (260), *I. L. R.* 21 *All.* 496 (*P. C.*), *I. L. R.* 19 *Cal.* 253 (262) (*P. C.*), 8 *Cal. W. N.* 690, 81 *P. R.* 1908, p. 386 and 36 *P. R.* 1899, referred to and distinguished—*I. L. R.* 36 *Mad.* 453 (*Cr.*), referred to.

... .. No. 102 P. R. 1916,

(2) SECTION 43.

Proper procedure before a sentence can be passed.

Held, that before a debtor can be sentenced to the penalty laid down in section 43 of the Provincial Insolvency Act, the ordinary procedure necessary for criminal proceedings must be gone through and a substantial defect in that procedure would be a ground for reversing the order.

27 *Indian Cases* 199, *I. L. R.* 17 *Cal.* 209, *I. L. R.* 27 *Bom.* 394 and 30 *Indian Cases* 839, referred to.

... .. No. 110 P. R. 1916.

(3) SECTION 47.

Does not empower Court to refer the whole proceedings to arbitration.

See *Insolvency*.

... .. No. 50 P. R. 1916.

PUNJAB ALIENATION OF LAND ACT, XIII OF 1900.

(1) SECTIONS 2 (3) AND 16.

Attachment of mortgagee's rights in execution of a money decree—transfer by judgment-debtor of his property after decree—fraud on decree-holder—right of transferee to object to attachment of the property

One A. D., a member of an agricultural tribe, held a mortgage over certain land. On the 19th February 1914 one G. R. obtained a money decree against A. D. and on the 5th March 1914 A. D. mortgaged his mortgagee rights to his brother, the present plaintiff; on the 27th April 1914 G. R. got the mortgagee rights of A. D. attached in execu-

PUNJAB ALIENATION OF LAND ACT, XIII OF 1900—*contd.*

tion of his decree. The plaintiff then instituted the present suit for a declaration that the mortgagee rights could not be attached and sold in execution of the decree.

Held, following 12 P. R. 1911 that the mortgagee rights of A. D. being "land" could not be sold in execution of the decree, *vide* sections 2 (3) and 16 of the Punjab Alienation of Land Act.

Held also, that a judgment-debtor is not bound to keep his property in a shape convenient for his creditors to proceed against and that the transfer by A. D. of his mortgagee rights to plaintiff for consideration 6 weeks before attachment, though it might be sharp practice, was not fraudulent in law.

Held further, that as plaintiff's interests were injured by the execution proceedings of G. R. against A. D. he was entitled to object to them.

... .. No. 39 P. R. 1916.

(2) SECTIONS 3 (2), 4, 14 AND 17 (2).

Member of an agricultural tribe qua a particular district—agreement to sell subject to there being no legal obstacle—want of sanction of Deputy Commissioner.

Defendant T. S., a Jat of the Lyallpur District, promised to sell the land in dispute situate in *tahsil* Jaranwala, District Lyallpur, to the plaintiff P. S., a Jat of the Hoshiarpur District, and on 5th January 1914 the former executed an agreement containing *inter alia* the stipulations that the sale deed would be executed and registered by the 21st February 1914, that the party committing breach of the contract would pay Rs. 1,000 as damages to the other and that if there was any legal obstacle to the execution and registration of the sale deed neither party would be entitled to any damages. Defendant refused to execute the sale deed by the prescribed date and consequently on the 24th February 1914, plaintiff instituted the present suit for specific performance of the contract and possession of land, sanction of the Deputy Commissioner to the sale was not obtained till after the institution of the suit.

Held, that as plaintiff neither held land nor resided in the Lyallpur District he was not a member of an agricultural tribe *qua* that district and was not entitled to purchase the land without the sanction of the Deputy Commissioner.

Local Government Notification No. 65, dated 18th April 1904, under section 4 of the Punjab Alienation of Land Act, referred to.

Held also, that as under sub-section 2 of section 17 of the Act, the deed of sale could not have been admitted to registration until a certified copy of the order granting such sanction was produced to the officer empowered to register the instrument and as no such sanction was forthcoming on the 21st February and in fact no application for sanction had up to that date been made there was a legal obstacle and the defendant under the agreement was accordingly entitled to put an end to the contract and by refusing to carry it out he did put an end to

PUNJAB ALIENATION OF LAND ACT, XIII OF 1900—*contd.*

it, and the fact that defendant subsequently obtained sanction afforded no justification for reviving the *vinculum juris*.

... .. No. 120 P. R. 1916.

(3) SECTIONS 3 (2), 5 AND 21 (2).

No right of pre-emption exists in respect of a sale sanctioned by Deputy Commissioner—Civil Court cannot take cognisance of the manner in which Deputy Commissioner exercises his powers.

See *Punjab Pre-emption Act*, 1913 (1).

... .. No. 124 P. R. 1916.

(4) SECTION 9 (3).

Mortgage—conditional sale—reference by Civil Court to Deputy Commissioner—jurisdiction of Civil Court after such reference.

Held, that after a Civil Court has made a reference in regard to a mortgage by conditional sale under section 9 (3) of the Punjab Alienation of Land Act and the Deputy Commissioner has made an offer to the mortgagee which they rejected, the Civil Court is *functus officio*.

... .. No. 55 P. R. 1916.

(5) SECTION 21 A (2).

as amended by Act of 1907—power of reference by Deputy Commissioner to Chief Court to have a declaratory decree of a Civil Court altered to make it consistent with the Act—when to be exercised.

On the death of one G. J. K., a Rajput of the Hoshiarpur district, his landed property was mutated by mutual consent, half in the name of his widow, Mussammat Basri, and half in the names of his three sons by Mussammat Begam, a *Natni* by caste, who claimed to be legitimate sons. Mussammat Begam was not a member of an agricultural tribe.

Certain reversioners of G. J. K. appealed to the Settlement Collector who found that the three sons were not legitimate and that mutation should be made in the name of Mussammat Basri alone.

Thereupon the three sons instituted a suit against Mussammat Basri for a declaration that they are sons and heirs of G. J. K. and entitled to half his estate. The reversioners applied to be made parties to the suit which was refused and on confession of judgment by Mussammat Basri plaintiffs obtained a decree. The Deputy Commissioner of Hoshiarpur then filed a revision to the Chief Court under section 21 A (2) of the Alienation of Land Act, as amended by Act I of 1907, on the ground that the decree was contrary to the provisions of that Act and prayed that the declaration in favour of the three sons be modified so as to have effect only during the lifetime of Mussammat Basri.

The questions submitted to the Full Bench were :—

(a) whether a decree which is only a declaration of title can be held to be a decree contrary to any of the provisions of the Alienation of Land Act, and

PUNJAB ALIENATION OF LAND ACT, XIII OF 1900—*concl'd.*

(b) if that question is answered in the affirmative, this Court must deal with the application upon the existing record or whether if the evidence on the record is not sufficient for the disposal of the application a remand for further inquiry could be ordered.

Held, that a decree even though it be only declaratory, which has the effect of conferring a legal title, when no such title would otherwise exist, may well be contrary to the provisions of the Act.

Held, however, that even if the decree in this case was contrary to the provisions of the Act, the relief prayed for by the Deputy Commissioner would not make it more consistent with it. *Also* that the decree being *in personam* against Mussammat Basri only, would not prejudice the reversioners' rights to sue after the death of Mussammat Basri to have the question of the legitimacy of the three plaintiffs tried.

Held also, that the object of section 21A, was to enable correction of decrees which on the face of the record infringe the provisions of the Act, as *e. g.*, if a Court has granted a decree for possession of land against a *Jat* and a *Sikh* to a person described in the plaint as a *banya* of Lahore city and would not apply to a case like the present where there is a genuine dispute between the parties as to legitimacy.

Held further, that having regard to sub-section 5 of section 21A, the Chief Court has power to order a remand where such an order is necessary.

... .. No. 52 P.R. 1916 (F. B.).

PUNJAB COURTS ACT, III OF 1914.

(1) SECTION 41 (3).

Second appeal—without certificate—existence of a custom.

The plaintiffs, as collaterals of one K. B., sued for a declaration that a deed of gift of ancestral land effected by K. B.'s widow in favour of a person who, it was asserted in the deed, had been adopted by her late husband should not affect their reversionary rights. The defence was simply that the donee was the appointed heir of K. B. and that in the circumstances the widow was entitled to rectify the erroneous mutation made in her favour at her husband's death. Both the lower Courts agreed in finding that the alleged adoption had not been proved but the Divisional Judge found that the gift was justified by the fact that the donee had rendered services to the widow. The plaintiffs presented a second appeal to the Chief Court urging that the lower Appellate Court had decided the case on a point entirely outside the pleadings.

Held, following 19 P. R. 1915 that a second appeal was competent without a certificate, as the question raised in the appeal was not the validity or existence of a custom but whether the validity or existence of a custom was a question properly before the lower Appellate Court.

... .. No. 34 P. R. 1916.

PUNJAB COURTS ACT, III OF 1914—*contd.*

(2) SECTIONS 39 AND 41.

Second appeal on question whether there was sufficient ground for extending period of limitation in Lower Appellate Court—jurisdiction—Indian Limitation Act, IX of 1908, section 5 and article 152—Limitation for appeal to District Court.

Plaintiff's suit was dismissed by a Munsiff, 1st class, on 8th June 1914. Plaintiff filed an appeal in the Court of the District Judge on the 1st August 1914, on which date the new Punjab Courts Act of 1914 came into force, *vide* notification of the Local Government dated 15th July 1914. The District Judge held that as the appeal to his Court had been presented more than 30 days after date of decree of the first Court, the appeal was barred by time and no indulgence could be allowed under the provisions of section 5 of the Limitation Act. The plaintiff then preferred a second appeal to the Chief Court.

Held, that the question as to whether there was sufficient cause within the meaning of section 5 of the Limitation Act for being late with an appeal cannot be gone into on second appeal.

I. L. R. 25 *All.* 71 and *I. L. R.* 26 *All.* 327, referred to.

Held also, that as the new Punjab Courts Act of 1914 had been passed in January 1914, assented to by the Viceroy in April, published in the *Punjab Government Gazette* in May and brought into force on 1st August under a notification of the Local Government, dated 15th July, the Act must be held to be retrospective in its operation and that consequently the District Judge was right in holding that the appeal to his Court was barred by time.

13 *Indian Cases* 264 (*Sind*), 5 *Indian Cases* 420 (*Mad.*), referred to, also 30 *P. R.* 1915.

Held further, that the appeal to the District Judge was one under the Code of Civil Procedure and that article 152 of the Limitation Act was consequently applicable to it.

... .. No. 88 *P. R.* 1916.

(3) SECTION 41.

Misreading evidence may afford sufficient reason for second appeal.

See *Second Appeal* (7).

... .. No. 81 *P. R.* 1916.

(4). SECTION 41.

Second appeal—where findings of fact are perverse.

See *Second Appeal* (14).

... .. No. 112 *P. R.* 1916.

PUNJAB COURTS ACT, III OF 1914—*contd.*

(5) SECTION 41 (1).

Second appeal—whether a question involving the interpretation of a document is one of law or fact.

Held, that the question involved in this case being “whether M. gifted *shamilat patti* to D. or not” was one of fact and the circumstance that in deciding that question one had to interpret a document did not alter the question into one of law and consequently no second appeal was competent.

As to when a question involving the interpretation of a document is one of law, explained.

... .. No. 68 P. R. 1916.

(6) SECTION 41 (1), CLAUSE (c).

Second appeal—substantial error or defect in procedure.

Held, that mere alleged error in *weighing* evidence is no ground for second appeal within the meaning of clause (c) of section 41 of the Punjab Courts Act.

... .. No. 72 P. R. 1916.

(7) SECTIONS 41 (1) AND (3).

Second appeal on point of custom without a certificate.

Held, that although under the provisions of sub-sections (1) and (3) of section 41 of the Punjab Courts Act, 1914, no second appeal is admissible in the absence of a certificate to decide “the existence or validity of a custom,” the Chief Court is not debarred from remitting a case for decision of a point of custom which has been overlooked or deliberately neglected by the Lower Appellate Court.

... .. No. 22 P. R. 1916.

(8) SECTION 41 (3).

** Certificate for second appeal on point of custom—when to be granted.*

Held, that the certificate referred to in section 41 (3) of the Courts Act should be granted only when the Lower Appellate Court can certify that the evidence regarding custom is so conflicting or uncertain, that there is such substantial doubt regarding its existence as to justify a second appeal and that the Chief Court will not act upon a certificate which should not have been granted having regard to the terms aforesaid.

... .. No. 82 P. R. 1916.

(9) SECTION 44.

Revision—failing to determine crucial point when deciding question of limitation—material irregularity—Indian Limitation Act, IX of 1908, section 6 and article 164—application to set aside an ex-parte decree—minority—General Clauses Act, X of 1897, section 6 (c).

PUNJAB COURTS ACT, III OF 1914—*concl'd.*

A mortgagee instituted a suit after the death of the mortgagor for the recovery of the money due on the mortgage against the mortgagor's representatives, *viz.*, his mother, widow and minor children. On 20th August 1908 an *ex-parte* decree was passed and the mortgaged property was sold in execution of that decree.

On 1st May 1914 the five children—three adults and two minors—applied to have the *ex-parte* decree set aside. The lower Court, without considering whether the provisions of the Limitation Act of 1877 or the Act of 1908 applied, decided that the application was in time.

Held, that where it is essential to a proper decision of a point of limitation to determine whether the provisions of the Limitation Act of 1877 or of the Act of 1908 are applicable and the lower Court fails to determine this question the omission amounts to a material irregularity and a revision is competent.

60 *P. R.* 1897 (*F. B.*), 72 *P. W. R.* 1910 and Civil Revision 52 of 1914 (unpublished), referred to.

Held also, that the period laid down in article 164 for an application to set aside an *ex-parte* decree cannot be extended on the ground of minority under section 6 of the new Limitation Act of 1908 which is limited to applications for the execution of a decree.

Held further, that the application in this case dated 1st May 1914 was governed by the Limitation Act of 1908 and not by the Act of 1877, notwithstanding the provisions of section 6 (c) of the General Clauses Act.

I. L. R. 35 *Mad.* 678, 12 *Bom. L. R.* 730 and *I. L. R.* 37 *All.* 597, referred to.

90 *P. R.* 1904, distinguished.

... .. No. 101 *P. R.* 1916.

PUNJAB LAND REVENUE ACT, 1887.

SECTION 158.

Jurisdiction of Civil Court to deal with an award of arbitrators defining shares in land.

See *Civil Procedure Code*, 1908 (7).

... .. No. 117 *P. R.* 1916.

PUNJAB LIMITATION ACT, I OF 1900.

(1) Not applicable to suits in which the alienation challenged was made by a woman.

See *Indian Limitation Act*, 1908 (10).

... .. No. 15 *P. R.* 1916.

PUNJAB LIMITATION ACT, I OF 1900—*consld.*

(2) ARTICLE 1.

Whether applicable to a suit, for a declaration instituted after the death of the alienor—Custom—Alienation—will in favour of mother and mother's brother in presence of near collaterals—Gujars of Gujar Khan Tahsil, Rawalpindi District.

This was a suit brought in 1910 by the near collaterals of one A. D., a Gujar of Gujar Khan *Tahsil* in the Rawalpindi District for a declaration that the will of A. D. made on 24th December 1899 by which he bequeathed the whole of his property to his mother and his maternal uncle is invalid and will not affect plaintiffs' reversionary rights on the death or remarriage of the mother. A. D. died shortly after making this will and mutation was granted in accordance with the provisions of the will, in spite of the objections of the collaterals, on 26th February 1901. The first Court threw the *onus* of proving the invalidity of the will on the plaintiffs and holding that they had not discharged the *onus* dismissed the suit. The Divisional Judge on appeal placed the *onus* of proving the validity of the will on the defendants and holding that defendants had not discharged this *onus* decreed for the plaintiffs. The defendants then appealed to the Chief Court.

Held, that notwithstanding that this suit for a declaration was brought *after* the death of the alienor the Punjab Limitation Act of 1900, article 1 was applicable to it and the suit was consequently not barred by limitation.

64 P. R. 1909, referred to.

Held also, that it had not been proved that by custom among Gujars of Gujar Khan *Tahsil* of the Rawalpindi District a childless proprietor can alienate the whole of his property to his mother and his mother's brother in presence of near collaterals.

... ..

No. 43 P. R. 1916.

PUNJAB LOANS LIMITATION ACT, I OF 1904.

Not applicable to suits on a balance of account.

See *Indian Limitation Act*, 1908 (9).

... ..

No. 16 P. R. 1916.

PUNJAB MUNICIPAL ACT, 1911.

(1) SECTION 3 (13) (b).

Definition of "street" and "public street"—presumed dedication of a road to the public—Indian Limitation Act, 1877, section 26.

Where it was found as a fact that the predecessors of the plaintiffs built a market of shops, known as the Nawab Ganj, with an open space lying between the shops opening into thoroughfares at various points and they then let the shops to grain dealers and the vacant space or part of it had been ever since used by all members of the public who

PUNJAB MUNICIPAL ACT, 1911—*contd.*

came in to buy and sell grain and by carts bringing in grain without interruption of any kind--

Held, that there was a presumption that they intended the members of the public to make use of the space left vacant or a part of it as a highway and that the *onus* was on the plaintiffs to show that the user was only permissive or that the dedication was limited to a particular class of persons, which *onus* they had failed to discharge.

62 *P. R.* 1898 (and reference therein made to the *dictum* of Chamber, J., in *Woodyer v. Hadden*, 5 Taunt 12), 6 *Cal. L. R.* 282, *I. L. R.* 30 *Bom.* 558 (567, 568), *I. L. R.* 32 *Mad.* 527, 8 *Indian Cases* 175, *I. L. R.* 33 *Cal.* 1290 (1296), referred to.

I. L. R. 6 *Bom.* 686, *I. L. R.* 20 *Bom.* 146 and 25 *W. R.* 233, distinguished.

Held also, that the fact that several of the exists from the market were provided with gates, which used to be shut at night for protective purposes only, made no difference and did not shew that the plaintiffs' predecessors reserved to themselves the right of closing the market at pleasure.

Held consequently, that the Municipal Committee was justified in making a metalled road on the vacant space, 10 feet wide, which it was not urged was an unreasonable width.

... .. No. 108 P. R. 1916.

(2) SECTION 3 (13) (b).

Limited access of public to a private place—presumption of dedication of road to public.

Held, that in the case of a private *serai* (in which there are no shops) occupied by tenants of the proprietors there was no presumption of dedication of a high-way to the public, a limited access by the public to a private place not operating to convert it into a public street, and consequently the Municipal Committee had no right to interfere with gates put up by the proprietors.

I. L. R. 6 *Bom.* 686 and *I. L. R.* 20 *Bom.* 146, referred to.

... .. No. 109 P. R. 1916.

(3) SECTION 175.

Suit to challenge action of Municipal Committee—whether competent—power of Committee to direct removal of projections on public street after having sanctioned its erection.

The Municipal Committee first sanctioned the erection by plaintiff of a verandah on a *chaubutra* lying in front of his house and afterwards required him to demolish it. The plaintiff then sued for an injunction against the Committee. The District Court held that the action of the Committee was not tainted with *mala fides*, but held that it was unreasonable and *ultra vires*

PUNJAB MUNICIPAL ACT, 1911—*concl'd.*

Held, by the Chief Court, that persons dissatisfied with the action of a Committee have a right of appeal, but not to a Civil Court, which can interfere only when the act complained of was in excess of the powers of the Committee and has no concern with the question whether such action was reasonable or not.

Held also, that on it being discovered that the site under the *chaubutra* was not the property of the plaintiff and was therefore part of the public street, the verandah built on it was overhanging the street and the Committee was under section 175, Punjab Municipal Act, justified in requiring it to be demolished on payment of reasonable compensation

52 P. R. 1900, distinguished.

... ..

No. 104 P. R. 1916.

(4) SECTIONS 189 (3), 193 AND 195.

Suit for injunction restraining the Municipal Committee from interfering with the upper storey of plaintiff's house—question whether Committee acted in good faith or mala fide—whether ground for second appeal—sanction to build conditional on erecting wall 2 feet back—propriety of condition.

In a sanction under section 193 of the Punjab Municipal Act the Municipal Committee attached the condition that plaintiff should not build his wall within 2 feet of a certain open space which was originally about 5 feet and 4 inches wide and would thus be increased in width by 2 feet. The plaintiff however built his house in disregard of this condition and thereupon the Committee served a notice on him under section 195 requiring him to demolish the upper storey of the building. The plaintiff then brought the present suit for an injunction restraining the Committee from interfering with the upper storey. The lower Courts found that the condition in question was not *ultra vires* and the action of the Committee was not *mala fide* and dismissed plaintiff's suit. Plaintiff thereon preferred a second appeal to the Chief Court.

Held, that the question whether the Committee acted in good faith or *mala fide* in imposing the condition on which alone it granted sanction to plaintiff to build a two-storied house was one of fact and could not be considered in second appeal.

Held also, on the merits, that there was nothing illegal, wanton, capricious or oppressive in a condition such as this which was aimed at restraining the building of erections consisting of more than one storey alongside a narrow open space but was on the contrary eminently reasonable and conducive to sanitation, free circulation of air and ventilation within the meaning and for the purposes of section 189 (3) (i) and (iii) of the Punjab Municipal Act.

... ..

No. 75 P. . 1916.

PUNJAB PRE EMPTION ACT, 1913.

(1) SECTIONS 9, 21 (2) AND 24.

Pre-emption in respect of sale sanctioned by Deputy Commissioner and sale without proper sanction—Punjab Alienation of Land Act

PUNJAB PRE-EMPTION ACT, 1913—*contd.*

XIII of 1900, sections 3 (2), 5 and 21 (2)—Jurisdiction of Civil Court to inquire into manner in which Deputy Commissioner exercises his powers.

Held, that section 9 of the Punjab Pre-emption Act, 1913, must be held to repeal by implication so much of section 5 of the Punjab Alienation of Land Act, 1900, as conflicts with itself and consequently no right of pre-emption exists in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the latter Act.

Maxwell on the Interpretation of Statutes, 4th edition, pp. 236 and 237, referred to.

Held also, that a Civil Court is debarred from taking cognisance of the manner in which the Deputy Commissioner exercises his powers under the Alienation of Land Act, *vide* section 21 (2) of that Act.

Held further, that if there is no valid sanction the sale in question is opposed to the provisions of the Land Alienation Act, and in this case section 24 of the Pre-emption Act requires that the suit for pre-emption shall be dismissed.

... .. No. 124 P. R. 1916.

(2) SECTION 11.

Member of same tribe—Darzi Mir and Darzi Mughal—district Rawalpindi..

The plaintiff, a Darzi Mir of *manza* Kuri in the district of Rawalpindi, sued for pre-emption in respect of certain sales of agricultural land situate in *manza* Majhuan, the vendor being a so-called Darzi Mughal and the vendees Brahmans of Rawalpindi city. The plaintiff claimed to be of the same tribe as the vendor under the *proviso* to section 11 of the Punjab Pre-emption Act.

Held, that in deciding whether persons belong to the same tribe, where the real facts are impossible to ascertain, names used are the only *data* left and should be dealt with in a liberal spirit.

112 P. R. 1908 and 62 P. R. 1909, referred to.

Held consequently, that in the absence of proof to the contrary Darzi Mir and Darzi Mughal are sub-divisions of a tribe of Darzis.

... .. No. 37 P. R. 1916.

(3) Section 11, *proviso*—*meaning of "recorded" (as an owner, &c.)*

Held, that the word "recorded" in the *proviso* to section 11 of the Pre-emption Act, means "entered in the record of rights" and a person cannot be properly said to be so entered, if only his name has been entered in the register of mutations by the patwari and a report put up in his favour in the appropriate column of that register.

17 P. R. 1915, p. 95, distinguished.

... .. No. 9 P. R. 1916.

PUNJAB PRE-EMPTION ACT, 1913—*concl.*

(4) SECTION 20.

Duty of Court to decide the issues suo motu.

Held, that it is the duty of the Court to investigate and decide the issues specified in section 20 of the Punjab Pre-emption Act, and the Court cannot be guided by the admissions of the parties, nor does their omission to adduce evidence on the point relieve the Court from the obligation created by the law.

... .. No. 14 P. R. 1916.

PUNJAB TENANCY ACT, 1887.

(1) SECTION 77 (3).

Suit by mortgagor for redemption—Claim by defendant that he is an occupancy tenant—whether Civil Court can take cognisance of such a claim.

Plaintiff mortgaged the land in suit with possession to defendants who were then recorded as tenants-at-will. Plaintiff now sued for redemption. Defendant pleaded that their real position was that of occupancy tenants and that consequently plaintiff was not entitled to a decree for physical possession of the property.

Held, that the defendants' plea could not be taken cognisance of by a Civil Court, *vide* section 77 (3) of the Punjab Tenancy Act.

76 P. R. 1909 (F. B.), referred to.

... .. No. 59 P. R. 1916.

(2) SECTION 77 (3).

As amended by Punjab Act, III of 1912—proper procedure of Civil Court where in a suit cognisable by it, it becomes necessary to decide a matter triable only by a Revenue Court.

Held, that 24 P. R. 1907 and 76 P. R. 1909 (F. B.) have been rendered obsolete by the *proviso* to sub-section (3) of section 77 of the Punjab Tenancy Act (added by Punjab Act III of 1912) and that the question whether defendants are occupancy tenants of the land concerned, arising in the suit, should have been referred for decision to a Revenue Court in the manner laid down in the said *proviso*.

... .. No. 111 P. R. 1916.

Q

QURAISHI SHEIKHS.

Of *mauza* Hardosheikh, *tahsil* Phillour, district Jullundur, are governed by custom.

See *Custom (Alienation)* (3).

... .. No. 19 P. R. 1916.

R

RAJPUTS.

(1) Bhatti of *Mauza Kum, Tahsil Pind Dadan Khan*, follow custom in matters of succession.

See *Custom (Alienation)* (1).

... .. No. 4 P. R. 1916.

(2) Of Garhshankar, Hoshiarpur district—succession to moveable property acquired with income of ancestral property—brother or daughter.

See *Custom (Succession)* (3).

... .. No. 13 P. R. 1916.

REGISTRATION.

Preference of registered document over oral gift, where actual possession is with a mortgagee.

See *Indian Registration Act*, 1908 (4).

... .. No. 30 P. R. 1916.

REGISTRATION ACT.

See *Indian Registration Act*.

RES JUDICATA.

(1) *Where previous suit was dismissed on ground of limitation only—Indian Limitation Act, IX of 1908, section 28 and schedule I—whether applicable to defence.*

One N. M. purchased a house which was sold by a receiver authorised to sell in order to clear off certain debts. N. M. got possession of it with the exception of two *kothris* which were locked up. One G. C. sued in 1911 for cancellation of the sale but his suit was dismissed as time-barred. N. M. then brought the present suit for possession of the *kothris* and G. C. resisted the claim on the ground that the sale was not binding on him. The lower Appellate Court held that G. C. having failed to get the sale set aside within the period allowed by law, could not impeach it now.

Held, that the decision in the previous suit of 1911 could not be regarded as *res judicata* as nothing was decided in that case, which was dismissed simply on the score of limitation.

Held also, that the defence could not be time barred under schedule I of the Limitation Act, as that schedule only provides periods of limitation within which "suits" must be brought, or under section 28, as G. C. had not been out of possession for a period exceeding that which the law would allow him for bringing a suit to recover possession and that, consequently, plaintiff must prove his right to dispossess him.

... .. No. 1 P. R. 1916.

RES JUDICATA—concl'd.

(2). "Former" suit—several suit decided by one judgment.

See *Custom (Alienation)* (7).

... .. No. 48 P. R. 1916.

(3). Of issue which it was unnecessary to decide in the previous case.

See *Custom (Succession)* (8).

... .. No. 56 P. R. 1916.

(4). Where the person concerned was only a nominal defendant in the previous suit.

See *Custom (Adoption)*.

... .. No. 65 P. R. 1916.

(5). Matter which ought to have been made ground of attack in previous suit.

See *Civil Procedure Code*, 1908 (2).

.. .. No. 94 P. R. 1916.

RESTITUTION OF CONJUGAL RIGHTS.

Discretionary power of Courts—when not to be exercised.

See *Marriage* (2).

... .. No. 46 P. R. 1916.

RESTORATION.

Of suit dismissed for default—effect of—on pending arbitration proceedings.

See *Dismissal for default*.

... .. No. 115 P. R. 1916

REVERSIONERS.

Status of—to contest alienation by Hindu widow—in presence of a daughter—Hindu Law.

See *Hindu Law* (3).

... .. No. 27 P. R. 1916.

REVISION (CIVIL).

(1). Failing to determine whether the Limitation Act of 1877 or that of 1908 applies to the case, a material irregularity.

See *Punjab Courts Act*, 1914 (9).

... .. No. 101 P. R. 1916

REVISION (CIVIL)—*conold*.

(2). Under Provincial Insolvency Act only admissible on a law point—whether intention with which a transfer of property is made is a question of law.

See *Provincial Insolvency Act*, 1907 (1).

... .. No. 102 P. R. 1916.

RIWAJ-I-AM.

(1). Entry in, when opposed to general custom, of little value unless supported by instances.

See *Custom (Succession)* (1).

... .. No. 7 P. R. 1916.

(2). Garhshankar, Hoshiarpur District—Rajputs—entry as to daughter not succeeding to her father's property not applicable to moveable property.

See *Custom (Succession)* (3).

... .. No. 13 P. R. 1916.

(3). Hoshiarpur District—*Brahmans*—succession of daughters to self-acquired property.

See *Custom (Succession)* (4).

... .. No. 23 P. R. 1916.

(4). Jullundur District—Tahsil Phillour—*Gujars*—gift of ancestral property to daughter's son.

See *Custom (Alienation)* (4).

... .. No. 29 P. R. 1916.

(5). Entry in—Ferozepore District—Gil Jats—as to daughter's exclusion—not applicable to self-acquired property.

See *Custom (Succession)* (5).

... .. No. 38 P. R. 1916.

(6). Tahsil Mukhtsar, District Ferozepore—*Banias*—succession of adopted son in natural family.

See *Custom (Succession)* (7).

... .. No. 45 P. R. 1916.

(7). Attock District—Pathans—no restriction upon alienation.

See *Custom (Alienation)* (8).

... .. No. 69 P. R. 1916.

RIWAJ-I-AM—concl'd.

(8). Hafizabad Tahsil, District Gujranwala—Khatri—daughters excluded from succession even of self-acquired property.

See *Custom (Succession)* (10).

... .. **No. 71 P. R. 1916.**

(9). Jats—Garhshankar Tahsil, Hoshiarpur District—entry in—excluding sister from succession—only applicable where there are collaterals.

See *Custom (Succession)* (13).

.. .. **No. 85 P. R. 1916.**

S

SECOND APPEAL.

(1). Whether competent on question of amount of damages in case of tort.

See *Torts*.

... .. **No. 17 P. R. 1916.**

(2). On point of custom without certificate.

See *Punjab Courts Act, 1914* (7).

... .. **No. 22 P. R. 1916.**

(3). Admissible without certificate on point whether validity or existence of a custom was properly before the Court.

See *Punjab Courts Act, 1914* (1).

... .. **No. 34 P. R. 1916.**

(4). *Law points—question whether consent of plaintiffs' fathers was bona fide or not—cause of action for a declaratory suit—whether welfare of estate has been threatened—pleas.*

M. S., M. H. and M. Hf., 3 brothers, held an estate in equal shares—on the death of M. Hf. his widow succeeded to a life interest in his share. In 1910 a part of the estate was acquired by Government under the Land Acquisition Act, the widow's share amounting to Rs. 6,115 which amount was paid to the widow in cash with the consent of her brothers-in-law in disregard of section 32 of the Land Acquisition Act. Plaintiffs the minor sons of M. S. and M. H. brought the present suit for a declaration that the widow is only entitled to use by way of maintenance the income of the sum received by her as compensation and that after her death plaintiffs shall be entitled to the capital, &c. Both the first Court and the lower Appellate Court decreed plaintiffs' claim and defendant preferred a second Appeal to the Chief Court.

Held, that the question whether the consent of plaintiffs' fathers was given *bona fide* (as found by the lower Courts) was one of fact and not of law and could not be reopened in second appeal.

SECOND APPEAL—*contd.*

Held also, that in the face of plaintiffs' allegation in their plaint, *viz.*, that defendant sets herself up as full owner and threatens to use the capital and the reply of defendant to the effect that plaintiffs have no rights in the property and she herself has every right to spend properly the compensation money awarded to her, it could not be said that plaintiffs had no cause of action for their suit.

1 *W. R.* 125, 47 *P. R.* 1884 and *I. L. R.* 22 *Mad.* 126, distinguished.

... .. **No. 63 P. R. 1916.**

(5). Interpretation of a document—when point of law, justifying second appeal.

See *Punjab Courts Act*, 1914 (5).

... .. **No. 68 P. R. 1916.**

(6). Error in weighing evidence no ground for—

See *Punjab Courts Act*, 1914 (6).

... .. **No. 72 P. R. 1916.**

(7). *On ground of misreading of evidence.*

Held, that misreading of evidence may afford sufficient reason for the Chief Court's interference on second appeal.

... .. **No. 81 P. R. 1916.**

(8). Chief Court will not act upon a certificate on point of custom, which should not have been granted.

See *Punjab Courts Act*, 1914 (8).

... .. **No. 82 P. R. 1916.**

(9). Question as to whether there was sufficient cause for presenting appellate in lower Appellate Court cannot be gone into on second appeal.

See *Punjab Courts Act*, 1914 (2).

... .. **No. 88 P. R. 1916.**

(10). Against decision by lower Appellate Court in exercise of its discretionary power to grant or refuse extension of time.

See *Indian Limitation Act*, 1908 (1).

... .. **No. 92 P. R. 1916.**

(11). Whether failure to deposit redemption money within time fixed by lower Appellate Court is a bar to—

See *Mortgage* (8).

... .. **No. 99 P. R. 1916.**

SECOND APPEAL—*concl'd.*

(12). Whether question of intention with which a transfer of property was made by an insolvent is one of law or fact.

See *Provincial Insolvency Act, 1907* (1).

... .. No. 102 P. R. 1916.

(13) *On points of acquiescence and necessity—delay—proof of acquiescence—quantum of proof of necessity after long lapse of time.*

Held, that acquiescence is sometimes a pure question of fact, *e. g.* when the point is to be decided solely on the allegation that the party positively and in set terms gave consent, but it is a question of law when the point is whether conduct of the party, not amounting to direct consent, should be taken as waiver.

Similarly "necessity" may be a question of fact, *e. g.* when the point is whether a sum of money was taken to the knowledge of the alienee to pay a previous genuine debt or *per contra* merely as an act of wanton extravagance, but when the point raised is whether the Court below has infringed rules and maxims laid down by the Chief Court and has decided on wrong principles as to the *quantum* of proof of necessity required, then the question is one of law.

61 *P. L. R.* 1901, referred to.

Held also, that mere delay in suing was not sufficient to prove acquiescence but that the lower Appellate Court had overlooked the principle laid down by the Chief Court that liberal allowance is to be made to alienees in the matter of *quantum* of proof of "necessity" where many years have elapsed since the events in question took place and that the appeal must be accepted on this point.

... .. No. 107 P. R. 1916.

(14) *Perverse finding of fact—place of residence—ancestral home, visited occasionally, but actual residence elsewhere—Civil Procedure Code, Act V of 1908, section 20.*

Held, that the Chief Court will not in second appeal interfere with the findings of fact of the lower Appellate Court if these findings are not perverse, *i. e.*, are based upon a consideration of all the material evidence.

Held also, that where defendants had lived and carried on business in Peshawar for forty years and there was apparently no intention of their ever returning to their original home at Nurpur, their place of residence under section 20 of the Code of Civil Procedure is Peshawar and not Nurpur, although they had an ancestral abode and some ancestral land at the latter place.

2 *Bom. L. R.* 605 and rulings cited in Woodroffe and Amir Ali's Code of Civil Procedure, 1908 edition, at p. 169, referred to.

I. L. R. 1 *All.* 51, *I. L. R.* 3 *All.* 91 (*P. C.*), *I. L. R.* 14 *Bom.* 541 (552), and *I. L. R.* 18 *Bom.* 290 (293), distinguished.

... .. No. 112 P. R. 1916.

SHAMILAT.

See *Village Common Land*.

... .. No. 6 P. R. 1916 (P. C.).

SISTERS.

(1) Presence of sisters of last holder does not prevent donated property from reverting to donor's family.

See *Custom (Alienation)* (1).

... .. No. 4 P. R. 1916.

(2) Succeed in preference to proprietary body—Jats—Garshankar Tahsil.

See *Custom (Succession)* (13).

... .. No. 85 P. R. 1916.

(3) Excluded by collaterals in 5th degree, in succession to ancestral property among Pathans, Tahsil Thanesar, District Karnal.

See *Custom (Succession)* (14).

... .. No. 100 P. R. 1916.

SPECIFIC RELIEF ACT, 1877.

SECTION 42.

Declaratory suit in respect of a will after death of testator—Court Fees Act, VII of 1870, section 7 (iv) (c)—suit for cancellation of a will.

One D. S. made a will in favour of Mussammat G. D. whom he described as his wife and died shortly afterwards. His brother's sons then brought the present suit for a declaration that the will is *null* and *void* and that Mussammat G. D. is not the widow of the deceased.

Held that, as the testator had died, the will had become operative and consequently the plaintiffs could not ask for a mere declaration in respect of it but must ask for its cancellation.

109 P. R. 1893, referred to.

Held also, that a suit for cancellation of a will comes within section 7 (iv) (c) of the Court Fees Act, and the plaintiffs must pay Court fees according to the amount at which the relief is valued by them in the plaint.

I. L. R. 29 Bom. 207 (dissenting from *I. L. R.* 5 All. 331) and 22 W. R. 438, referred to.

... .. No. 87 P. R. 1916.

SURETY.

Becomes liable as principal where real principal is a minor.

See *Indian Contract Act*, 1872 (1).

... .. No. 54 P. R. 1916.

T

TARKHANS.

Residents of Multan City—governed by Muhammadan Law.

See *Custom (Succession)* (12).

... .. No. 84 P. R. 1916.

TORTS.

Assault and battery—damages—amount of—whether question of fact or law—costs incurred in criminal prosecution, whether allowable.

Held, that the estimate of the amount of damages for assault and battery is a question of fact, unless such amount is beyond the legal limits, if any, or is assessed upon a wrong principle of law.

10 *W. R.* 164, 13 *W. R.* 22, 13 *W. R.* 391 and 3 *Cal. L. J.* 140, referred to.

1 *P. R.* 1915, explained.

Held also, that the costs incurred by the plaintiff in a criminal action brought by him against the defendants are no part of the consequences of the wrong done by the latter and cannot therefore be recovered.

7 *All. W. N.* 104, 1 *I. L. R.* 12 *All.* 166 and 1 *I. L. R.* 32 *Cal.* 429, referred to.

1 *I. L. R.* 4 *All.* 97, dissented from.

... .. No. 17 P. R. 1916.

TRANSFER OF PROPERTY ACT, IV OF 1882.

(1) SECTION 58.

Definition of mortgage—adopted in Punjab.

See *Mortgage* (4).

... .. No. 53 P. R. 1916 (F. B.).

(2) SECTION 81.

Marshalling—where puisne mortgagee had notice of other mortgage.

See *Mortgage* (7).

... .. No. 86 P. R. 1916.

TRANSFER OF PROPERTY ACT, IV OF 1882—*concl'd.*

(3) SECTION 99.

Not to be applied in the Punjab—Civil Procedure Code, 1908, order 34, rule 14, explained—sale of equity of redemption in execution of a decree unconnected with mortgage bars suit by mortgagor for redemption of the mortgage.

The plaintiff had mortgaged his house to defendant with possession but remained in possession as defendant's tenant under a lease. Defendant sued the plaintiff for arrears of rent and obtained a decree; and in execution of it he had the equity of redemption sold and purchased it himself with the permission of the Court. The auction sale was confirmed by the Court, plaintiff's objection to it being overruled. Plaintiff brought a regular suit to have the auction sale set aside, but the suit was dismissed and his appeal rejected. The plaintiff now sued defendant for redemption of the mortgage alleging that the sale of the equity of redemption could not affect his right to redeem the mortgage. The lower Courts concurred in decreeing plaintiff's claim on the principle underlying section 99 of the Transfer of Property Act, 1882.

Held, that having regard to the fact that section 99 of the Transfer of Property Act has been repealed by order XXXIV, rule 14 of the Code of Civil Procedure of 1908 and the rule of law set out in the section has been considerably modified by the said rule 14 and is technical in its nature, there is no good reason for applying the principle underlying section 99 to the Punjab.

Held also, that the principle of law embodied in order XXXIV, rule 14 of the Code of Civil Procedure is in favour of a mortgagee who purchases the equity of redemption at a Court sale in execution of a money-decree obtained by him in satisfaction of claim unconnected with the mortgage.

Held also, that even if section 99 of the Transfer of Property Act had been applicable to the case the sale was not void but merely voidable; objections had to be made before it was confirmed and as the sale had been confirmed the purchaser obtained an indefeasible title whether he was an outsider or the mortgagee bidding with the leave of the Court.

I. L. R. 35 Cal. 61 (F. B.) and I. L. R. 37 All. 165 (F. B.), followed.

2 P. R. 1907 and 15 P. R. 1911, distinguished.

I. L. R. 29 Mad. 421, I. L. R. 30 Mad. 362, I. L. R. 32 Cal. 296 (P. C.), I. L. R. 22 Mad. 347, I. L. R. 22 Bom. 624, 6 Indian Cases 47 S. C. 14 Cal. W. N. 579, referred to.

No. 18 P. R. 1916

U

UNREGISTERED DOCUMENT.

(1) Whether admissible for collateral purpose.

See *Indian Registration Act, 1877 (1).*

UNREGISTERED DOCUMENT—*conold*.

(2) Whether admissible for collateral purpose.

See *Indian Registration Act*, 1908 (2).

... .. No. 49 P. R. 1916.

V

VILLAGE COMMON LAND.

*Non-proprietors paying tirni—whether entitled to share in it.**Held*, that the payment of *tirni* by a person who is not a proprietor paying land revenue, does not confer upon him any right to participate in the partition of the *shamilat*.

... .. No. 6 P. R. 1916 (P. C.).

VILLAGE PROPRIETORS.

Do not succeed in preference to a sister—Jats—Garhshankar Tahsil.

See *Custom (Succession)* (13).

... .. No. 85 P. R. 1916.

W

WIDOW.

(1) Entitled to a life interest in her husband's estate both under Hindu law and agricultural custom.

See *Custom (Succession)* (2).

... .. No. 8 P. R. 1916.

(2) Of adopted son—whether she succeeds collaterally.

See *Custom (Succession)* (6).

... .. No. 44 P. R. 1916.

(3). Collateral succession by—*Pathans*, Jullundur City.See *Custom (Succession)* (15).

... .. No. 121 P. R. 1916.

(4). Proper amount of maintenance for Hindu widow, and residence.

See *Hindu Law* (11).

... .. No. 123 P. R. 1916.

(5). Presumption is that when a widow takes the whole of her husband's estate that she takes for life only.

See *Custom (Succession)* (16).

... .. No. 125 P. R. 1916.

WILL.

(1). Suit for declaration *after* death of testator does not lie—must sue for cancellation.

See *Specific Relief Act*, 1877.

... .. No. 87 P. R. 1916.

(2). *Ofa Hindu*—construction of—absolute gift with gift over in case of death of legatee.

Plaintiff, as the son of one T. R. deceased, claimed the half share in certain houses left to his father under the will of his father's father. The will left a share to T. R. as *malik* and *kabiz* but went on to say, "in case he dies on account of the said disease (he was subject to fits of epilepsy) his wife shall be entitled to maintenance allowance and all the brothers shall be owners of his property in equal shares, etc." The will was dated 19th December 1894. The testator died in 1895 or 1896 and some two and a half years later T. R. begot a son, the present plaintiff, and died 10 months later.

Held, that having regard to the circumstances of the case and the provisions of the will as a whole the proper construction of the clause (above cited) was "in case he dies without issue *before me*, etc." and that consequently plaintiff was entitled to succeed to his father's share under the will.

I. L. R. 24 Cal. 834 (*P. C.*), *I. L. R.* 40 Cal. 274 (*P. C.*), 22 Cal. L. J. 316, 27 *Indian Cases* 239 (*Cal.*), and Mayne's *Hindu Law*, 8th edition, page 589, referred to.

I. L. R. 20 Cal. 906 and 13 *Indian Cases* 571, distinguished.

... .. No. 114 P. R. 1916.

(3). Power of testation governed by same rules as power of gift.

See *Custom (Alienation)* (12).

... .. No. 122 P. R. 1916.

(4). Testator suffering from plague—disposing mind.

See *Hindu Law* (11).

... .. No. 123 P. R. 1916.

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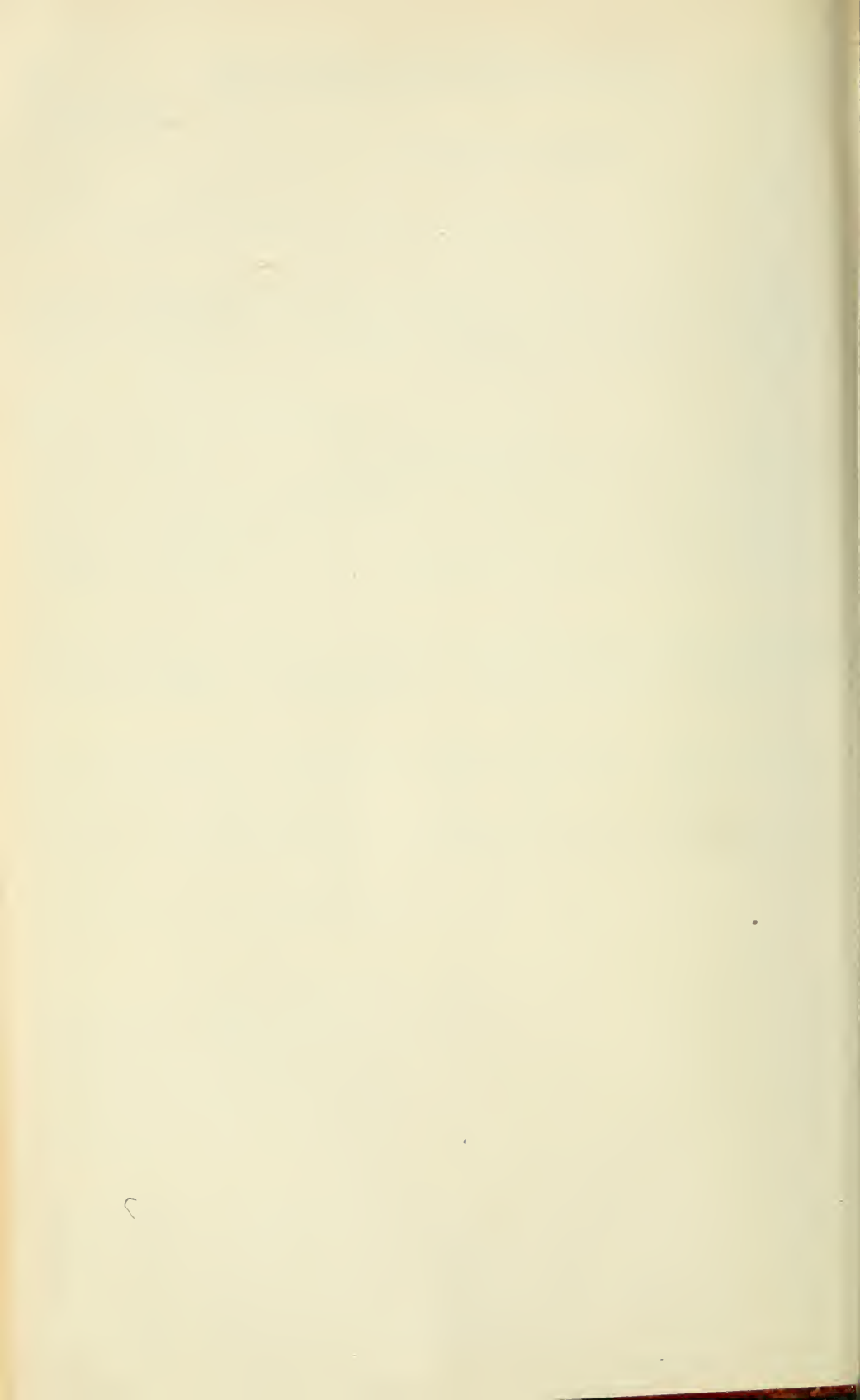
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C

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CONFESSION.

Of accused to Zaildar—inducement—presence of Police—retracted confession of one accused—value of, as against himself and as against co-accused—corroboration.

One of the accused charged with murder made a confession to a Zaildar and another accused confessed to a Magistrate.

Held, that evidence of the confession to the Zaildar could not be received :—

(1) Because the Zaildar remarked that his brother had committed a murder and had got off on making a clean breast of it and this was inducement.

CONFESSION—*concl.*

(2) As the police were in the immediate vicinity at the time of confession and thus it was doubtful whether the confession was not practically made to them.

(3) As accused was at the time in police detention as a suspect and to all intents and purposes in police custody and thus no confession could be proved unless made to a Magistrate.

Held also, that the confession of the other accused retracted at the first opportunity was not sufficient to prove his own guilt and could not be relied on as proof of the guilt of his co-accused without corroboration.

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See *Jurisdiction (Criminal)* (2).

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CRIMINAL PROCEDURE CODE, 1898.

(1) SECTIONS 4 (m), 100 AND 476.

Power of Magistrate to examine persons on oath—Indian Oaths Act, X of 1873, sections 4, 5 and 12—sanction to prosecute false witnesses for perjury.

Held, that in proceedings under section 100 of the Code of Criminal Procedure a Magistrate is a "Court" within the meaning of section 4 of the Indian Oaths Act, empowered to examine persons on oath and such persons are bound to take the oath and to state the truth, *vide* sections 5 and 14 of that Act.

Held also, that the proceedings before the Magistrate are "judicial proceedings" within the meaning of sections 4 (m) and 476 of the Code of Criminal Procedure and the Magistrate is authorised to sanction the prosecution of a witness for making a false statement before him on oath in the course of such proceedings.

I. L. R. 12 Bom. 36, *I. L. R.* 15 Mad. 138 (F. B.), 15 *Indian Cases* 652 (F. B.), *I. L. R.* 15 All. 141 and *I. L. R.* 39 Cal. 953 (966), referred to.

I. L. R. 27 Cal. 455, practically dissented from in 8 Bom. L. R. 589, not followed.

CRIMINAL PROCEDURE CODE, 1898—*contd.*

I. L. R. 12 *Bom.* 36 and *I. L. R.* 6 *All.* 487, distinguished and 9 *P. R. (Cr.)* 1908, referred to.

I. L. R. 16 *Mad.* 421, followed in 8 *Bom. L. R.* 589, *I. L. R.* 19 *Mad.* 18, *I. L. R.* 14 *Bom.* 381, *I. L. R.* 28 *All.* 89 and *I. L. R.* 15 *Cal.* 109, approved.

I. L. R. 39 *Cal.* 403 and 2 *P. R. (Cr.)* 1893, distinguished.

... .. **No. 34 P. R. (Cr.) 1916.**

(2) SECTIONS 110, 117 (2) AND 256.

Right to recall witnesses for prosecution for cross-examination in proceedings under section 110.

Held, that notwithstanding the provisions of section 117 (2) of the Code of Criminal Procedure, a defendant in proceedings under section 110 for security for good behaviour has not the right of recalling the witnesses for the prosecution for further cross-examination allowed in warrant-cases under section 256.

I. L. R. 35 *Cal.* 243, followed.

... .. **No. 1 P. R. (Cr.) 1916.**

(3) SECTION 145.

Order made without regard to provisions of section and without recording evidence.

The Magistrate passed an order under section 145 of the Code of Criminal Procedure against the petitioner without making any order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the wall in question and requiring the parties concerned to attend his Court and put in written statements, &c., and without recording the statements of petitioner's witnesses.

Held, that the Magistrate had wholly disregarded the positive provisions of section 145 and the order was *ultra vires* and must be set aside.

68 *P. L. R.* 1914 and 1 *P. R. (Cr.)* 1916, referred to.

... .. **No. 22 P. R. (Cr.) 1916.**

(4) SECTION 145 (4).

Necessity of taking evidence.

Held, that before passing an order for possession in proceedings under section 145 of the Code of Criminal Procedure the Magistrate should receive the evidence produced by the parties (*vide* clause 4 of the section) and that this requirement was not satisfied by the examination of a person who was not the witness of either of the parties.

8 *Cal. W. N.* 719, referred to.

... .. **No. 4 P. R. (Cr.) 1916.**

CRIMINAL PROCEDURE CODE, 1898—*contd.*

(5) SECTIONS 177 AND 179.

Loss incurred by reason of infringement of copyright is not a consequence within the meaning of section 179.

See *Jurisdiction (Criminal)*, (2).

... .. No. P. R. (Cr.) 1916.

(6) SECTIONS 195, 439 AND 537.

Power of Chief Court to pass orders as appear necessary, even when petitioner failed within time to appeal from order sanctioning his prosecution—sanction granted by the successor of the Munsiff before whom the alleged offence was committed and without notice to accused.

Held, that under section 439 of the Code of Criminal Procedure the Chief Court has power to examine the record and pass such orders as may be necessary, notwithstanding that the accused petitioner failed to appeal within time from the order sanctioning his prosecution.

Held also, that in cases like the present before giving sanction to prosecute under section 195, notice should invariably be issued to the party concerned.

Held further, that there is no Court of a Munsiff of the 1st Class as a permanent Court with a perpetual succession of Judges and that on transfer of a Munsiff from a district, the Court of the Munsiff who takes over the pending work is not identical with the Court of the Munsiff who has been transferred and consequently the sanction granted in this case by the successor of a Munsiff was without jurisdiction and must be set aside, as the trial had not concluded.

25 P. R. (Cr.) 1889, 30 P. R. (Cr.) 1901, 7 P. R. (Cr.) 1902, 6 P. R. (Cr.) 1909 and 7 P. R. (Cr.) 1913, referred to.

I. L. R. 29 *Mad.* 331, *I. L. R.* 32 *Bom.* 184, *I. L. R.* 37 *Cal.* 642 (*F. B.*), *I. L. R.* 39 *Cal.* 463 (466) and 29 P. R. (Cr.) 1879, distinguished.

Held also, that such an illegality was probably not cured by section 537 of the Code.

I. L. R. 25 *Mad.* 61 (*P. C.*), referred to.

... .. No. 23 P. R. (Cr.) 1916.

(7) SECTIONS 227, 231 AND 232.

Amendment of charge by Sessions Judge—power of Chief Court to order new trial or convict accused of the original charge.

The appellant was committed to the Sessions Court on a charge under section 460 of the Penal Code. This charge remained on the record until after the assessors had given their opinion when the Court recorded an order to the effect that the appellant should have been charged under section 302 and thereon amended the charge accordingly and convicted the appellant of that offence.

CRIMINAL PROCEDURE CODE, 1898—*contd.*

Held, that an amendment of the charge by the Sessions Court under section 227 of the Code of Criminal Procedure is only permissible up to the time of the taking of the opinion of the assessors and that the amendment in this case was, consequently, illegal.

Held also, that it is imperative under section 231 of the Code that the Court when it has altered the charge or added to the charge after the commencement of the trial should allow the prosecution and the accused to recall or re-summon and examine with reference to such alteration or addition, any witness who may have been examined and also to call any further witness whom the Court may think to be material.

Held further, that under the circumstances of the case the Chief Court on appeal could either set aside the conviction under section 302 and order a new trial (*vide* section 232 of the Code) or find the appellant guilty under section 460.

... .. No. 33 P. R. (Cr.) 1916.

(8) SECTION 369.

Review of judgment by a Sessions Court—whether competent.

Held, that a Sessions Court is not competent to review its judgment, *vide* section 369 of the Code of Criminal Procedure.

8 P. R. (Cr.) 1909, I. L. R. 35 Cal. 350, I. L. R. 22 Bom. 949, 30 Indian Cases 136, I. L. R. 38 All. 134 and 21 Indian Cases 447, referred to.

2 P. W. R. 1910 (Cr.), distinguished.

... .. No. 25 P. R. (Cr.) 1916.

(3) SECTIONS 408 AND 413.

Appeal in cases where several accused are convicted and one is sentenced to an appealable sentence and another to a fine of Rs. 40.

Held, that where at a joint trial of two or more persons by a 1st Class Magistrate an appealable sentence is passed upon any one of them, all those convicted have under section 408 of the Code of Criminal Procedure the same right of appeal, including those whose sentences are of the kind against which appeal would have been barred by section 413 if they had been tried singly.

9 Cr. L. J. R. 356 (F. B.), followed.

5 Cr. L. J. R. 496, referred to.

5 Bom. H. C. R. (C. C.) 24 and 7 Bom. H. C. R. (C. C.) 35, distinguished.

... .. No. 16 P. R. (Cr.) 1916.

(10) SECTION 408 (b).

Appeal by person sentenced by Magistrate with enhanced powers to two years' imprisonment in a case in which another accused was sentenced to a term exceeding four years.

CRIMINAL PROCEDURE CODE, 1898—*contd.*

The appellant was sentenced by a Magistrate of the 1st Class, exercising enhanced powers under section 30 of the Code of Criminal Procedure, to two years' rigorous imprisonment and fine of Rs. 200 in a case in which another accused was sentenced to five years' rigorous imprisonment and a fine of Rs. 200. The latter did not appeal. In the appellant's appeal the Sessions Judge declined jurisdiction.

Held, that under section 408 (b) of the Code of Criminal Procedure the appeal lay to the Chief Court.

17 *Mad. L. J. R.* 248, referred to.

... .. No. 5 P. R. (Cr) 1916

(11) SECTION 423.

Where accused were convicted by first Court separately under sections 147 and 325, Penal Code the Appellate Court on setting aside the conviction under section 325, has no power to enhance the sentence under section 147.

See *Indian Penal Code* (4).

... .. No. 31 P. R. (Cr.) 1916.

(12) SECTION 476.

Sessions Judge directing prosecution of witnesses for perjury—delay of some 3 months after recording their statements—and also in regard to evidence taken before Committing Magistrate and transferred to Sessions record.

In the present case the Sessions Judge convicted certain persons of murder and sentenced them to death and some 3 months later, when the appeal had been decided by the Chief Court and the record returned to his Court, took action against the 9 petitioners under section 476 of the Code of Criminal Procedure and ordered their prosecution for offences under section 194 of the Penal Code. In the case of 8 of the petitioners the alleged false evidence was given before the Sessions Judge himself and in the case of the ninth petitioner the evidence was given before the Committing Magistrate and transferred to the Sessions record and read out as evidence at the trial.

Held, that the evidence taken of one of the petitioners before the Committing Magistrate, having been read out as evidence in the Sessions Court, was certainly brought under the notice of that Court in the course of a judicial proceeding within the meaning of section 476 of the Code of Criminal Procedure and the Sessions Judge's order for his prosecution was consequently not *ultra vires*.

6 *All. L. J.* 392, referred to.

6 P. R. (Cr.) 1909, distinguished.

Held also, that there is nothing in section 476 which requires the Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter and that in this case the Sessions Judge was

CRIMINAL PROCEDURE, CODE, 1898—*contd.*

fully justified in waiting until the appeal had been decided by the Chief Court.

I. L. R. 32 *Bom.* 184, 13 *All. L. J.* 466 and *Cr. Rev. No.* 639 of 1913 (unpublished), followed.

I. L. R. 34 *Cal.* 551 (*F. B.*), *I. L. R.* 31 *Mad.* 140 (*F. B.*) and *I. L. R.* 32 *Mad.* 49 (*F. B.*), not followed.

... .. No. 29 P. R. (Cr.) 1916.

(13) SECTION 488.

Application for maintenance after a similar application on same allegations has been rejected as not proved.

The wife of one S. applied in 1914 for maintenance, alleging cruelty for not living with her husband. Her application was dismissed on the ground that she had failed to prove the alleged cruelty, subsequently she presented a fresh application, again alleging the same cruelty, which was tried by another Magistrate, who found that cruelty had been proved and granted her prayer for maintenance.

Held, following *I. L. R.* 5 *All.* 224 that no second enquiry into the same allegation, which had once already been enquired into and adjudicated on by a competent Court, was competent and that the order of the Magistrate granting maintenance must accordingly be set aside.

1 *Cal. L. R.* 89, distinguished.

9 *Cr. L. J.* 21, disapproved.

... .. No. 24 P. R. (Cr.) 1916.

(14) SECTION 562.

Whether restricted to juvenile offenders.

Held, that section 562 of the Code of Criminal Procedure is not restricted to juvenile offenders only.

2 *Bom. L. R.* 817 and 2 *L. B. R.* 314, referred to.

... .. No. 11 P. R. (Cr.) 1916

(15). SECTION 562.

First offender—punishment—offence under Punjab Excise Act, I of 1914, section 61.

Three persons were convicted under section 61 of the Punjab Excise Act, I of 1914, for the offence of manufacturing liquor contrary to law and being in possession of it and were sentenced by the Magistrate to 4 months' rigorous imprisonment and Rs. 50 fine each. On appeal the Sessions Judge reduced the sentences to 21 days' imprisonment and a fine of Rs. 20 in each case on the ground "that this is applicants' first offence, that the principles of section 562, Code of Criminal Procedure, applied and that appellants are father and two sons."

CRIMINAL PROCEDURE CODE, 1898—*concl'd.*

Held, that section 562 of the Code of Criminal Procedure was intended to apply to cases where offenders (and especially youthful offenders), without being persons of depraved character, may have succumbed to sudden temptation and the section could not properly apply to such an offence as that of manufacturing illicit liquor which implied a good deal of preparation. Also that as this offence probably escaped detection 9 times out of 10 and deprives Government of revenue, besides demoralising the people, deterrent sentences are necessary, and this was also the intention of the Legislature as shown by the raising of the maximum period of imprisonment in the penal sections of the new Act as compared with the old Act.

... .. No. 19 P. R. (Cr.) 1916.

CRIMINAL TRIAL.

Evidence—duty of prosecution to produce before Magistrate all persons said to have witnessed the offence.

Held, that all persons said to have witnessed the offence tried should be produced before the Magistrate though it is not necessary for a Public Prosecutor to tender in the Sessions Court any witness whom he may have reason to believe will give false evidence.

19 Cal. W. N. 28, referred to.

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D

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See *Indian Penal Code*, 1860 (7).

... .. No. 6 P. R. (Cr.) 1916.

E

EVIDENCE.

(1) Duty of prosecution to produce all eye witnesses before Magistrate.

See *Criminal Trial*.

... .. No. 12 P. R. (Cr.) 1916.

(2) Statement of deceased—who committed suicide owing to treatment of accused—admissible.

See *Indian Evidence Act*, 1872 (3).

... .. No. 20 P. R. (Cr.) 1916.

(3) *Circumstantial—when sufficient to justify conviction for a criminal offence.*

EVIDENCE---*concl'd.*

Held, following 18 Cal. W. M. 1144, that circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused.

But held also, that this *dictum* must be interpreted in a reasonable way. Thus the word "exhaustive" must not be taken to mean that every incident short of the actual commission of the offence must be proved by positive evidence and the word "possibility" must not be treated as signifying "physical possibility" but a high degree of probability, that is, so high a degree of probability that a prudent man considering all the facts and realising that the life or liberty of the accused person depends upon the decision feels justified in holding that the accused committed the crime.

... .. No. 32 P. R. (Cr) 1916.

F

FOREIGNERS ORDINANCE, III OF 1914.

SECTIONS 3, 4 AND 7.

Procedure for trial of an offender—right of appeal.

Held, that an Ordinance is a law and the infringement of its provisions is an offence and that therefore the inquiry into such an offence must be dealt with according to the provisions of the Criminal Procedure Code, in the absence of any other enactment prescribing a different method of inquiry, and, if the offence is one under Ordinance III of 1914, in the absence of any rule to the contrary made under section 7 of that Ordinance.

Held, consequently, that a person convicted and sentenced by a District Magistrate for an offence against section 3 of Ordinance III of 1914 has a right of appeal to the Court of Session—*vide* section 408 of the Code of Criminal Procedure.

... .. No. 10 P. R. (Cr.) 1916.

I

INDIAN COMPANIES ACT, VI OF 1882.

(1) SECTIONS 48, 50.

Complaint by a clerk, for Registrar Joint Stock Companies—plea that accused though acting as director was not properly qualified and that accused was not appointed a director until after date when penalty first accrued.

Held, that under Punjab Government Notification No. 3, dated the 3rd February 1910, published in the *Punjab Gazette* of the 25th February 1910, the Registrar of Joint Stock Companies is empowered to authorize any person to institute complaints of offences under the Companies Act and that therefore the complaint filed in this case by a clerk duly authorised by the Registrar was a proper complaint.

35 P. W. R. (Cr.) 1910, distinguished.

INDIAN COMPANIES ACT, VI OF 1882—*concl'd.*

Held also, that a person who acts as a director or manager of a company cannot set up, in answer to a penalty under section 50 of the Companies Act, that he was not legally a director or manager as, *e. g.*, that he did not hold the requisite number of shares to qualify him for the post of director.

L. R. 10 Q. B. 329, referred to.

Held further, that it is the bounden duty of a company and its directors and managers to forward to the Registrar the summary and list specified in section 48 of the Act, and that this obligation does not come to an end on the date on which, by default of the company, directors and managers, the penalty begins to accrue, and consequently, the fact that an accused person did not become a director or manager until after the date when the penalty first accrued is immaterial, though he could not be punished for the period of the default prior to his becoming a director or manager or acting as such.

48 *L. T. 675* and 1891 *Q. B. 588* (596), referred to.

... .. **No. 14 P. R. (Cr.) 1916.**

(2) SECTION 74.

Default in filing Balance Sheet with the Registrar, Joint Stock Companies—responsibility of Managing Agents and Directors.

Held, that a Director of a Company cannot escape liability for the penalty laid down in section 74 of the Companies Act of 1882 for not filing the Balance Sheet in time with the Registrar of Joint Stock Companies on the ground that he depended upon the Managing Agents of the Company or another Director to see to it and had urged them on several occasions to do the needful.

Held also, that Managing Agents entrusted with the management of a Company, subject to the control of the Directors, are Managers within the meaning of section 74 and as such liable to the penalty prescribed by the section.

Held further, that the fact that one of the Directors was also a member of the Firm which acted as Managing Agents on whom the penalty had been imposed as such, was no ground for not imposing upon him the penalty also in his other capacity as a Director.

... .. **No. 18 P. R. (Cr.) 1916.**

INDIAN COPYRIGHT ACT, 1914.

SECTION 7 (a).

Offence only triable at place where it was committed and not where loss occurred.

See *Jurisdiction (Criminal)* (2).

.. .. **No. 28 P. R. (Cr.) 1916.**

INDIAN EVIDENCE ACT, 1872.

(1) SECTION 3.

Misrepresentation of fact, explained.

See *Indian Penal Code*, 1860 (2).

... .. No. 17 P. R. (Cr.) 1916.

(2) SECTION 27.

Where two persons are alleged to have given information which led to the discovery of certain facts—necessity of proving the information given by each specifically—the first information only admissible.

Where in a criminal case it is alleged that two of the prisoners gave certain information to the police which led immediately to the arrest of one of the other accused.

Held, that it is only the information first given which can be admitted under section 27 of the Evidence Act and that it is necessary where two prisoners are said to have given information that what each prisoner said should be precisely and separately stated.

92 P. L. R. 1902 and I. L. R. 6 All. 509 (533) per Straight, J., reproduced at page 170 in Ameer Ali and Woodroffe's *Law of Evidence* (14th edition), referred to.

... .. No. 7 P. R. (Cr.) 1916.

(3) SECTION 32 (1) AND ILLUSTRATION (a).

Admissibility of statement of deceased, who committed suicide owing to ill-treatment by accused, charged under section 330 of the Penal Code.

The accused were charged under section 330 of the Penal Code with having, for the purpose of extorting a confession, caused hurt to one R. who committed suicide in consequence of the ill-treatment. The question was whether a statement made by R. as to the cause of his wounding himself with a razor (which caused his death) was admissible in evidence in the case, the accused not being charged with having caused the death of R.

Held, that as there was no doubt that the suicide of R. was the result of the ill-treatment by the accused, that treatment was the cause, though not the direct cause of the death and although the accused were not legally responsible for the suicide the cause of death came into question in this case, the whole affair, ill-treatment and subsequent suicide being all one transaction and consequently the statement of the deceased was admissible under section 32 (1) of the Evidence Act.

The difference between English law and the law in India referred to.

17 P. R. (Cr.) 1901 and I. L. R. 25 Bom. 45, distinguished.

... .. No. 20 P. R. (Cr.) 1916.

INDIAN FOREST ACT, 1878.

SECTIONS 25 (b) AND 76.

Whether accused can be convicted for two offences for one act of carelessness and for indirect consequence of his act—Indian Penal Code, section 71.

The facts found were that accused kindled a fire in his master's garden and left it burning, that this fire spread to the Bhadwar *shamilat*, an unclassified forest, and thence to the Tattal Reserved Forest. The accused was accordingly convicted of two offences, *viz.*, (1) under section 76 of the Forest Act, read with rule 28 of Punjab Government Notification No. 61 of 26th January 1897, and (2) under section 25 (b) and Notification No. 1137 of 3rd October 1904.

Held, that in the absence of any evidence or allegation to the contrary the Bhadwar *shamilat* must be held to be unassessed waste land situate in Bhadwar village to which Punjab Government Notification No. 61 of 26th January 1897 is applicable and conviction (1) was consequently justified.

But held, that a person cannot be said to set fire to a thing, if it catches fire as an indirect consequence of his act, and consequently conviction (2) was not justified by the mere fact that the fire spread from the Bhadwar *shamilat* to the Tattal Reserved Forest, a mile away from the former.

Held further, that as petitioner committed only one act of carelessness, he could not be tried and punished for two separate offences having regard to section 71 of the Indian Penal Code.

... .. No. 30 P. R. (Cr.) 1916.

INDIAN PENAL CODE.

(1) SECTION 71.

Accused not liable to two offences for one act of carelessness.

See *Indian Forest Act*, 1878.

... .. No. 30 P. R. (Cr.) 1916.

(2) SECTIONS 90, 361 AND 366.

Kidnapping—consent of minor—consent of guardian given on a misrepresentation of a fact—Indian Evidence Act, I of 1872, section 3.

Held, that having regard to the definition of the offence of kidnapping given in section 361 of the Penal Code, the essence of the offence is the taking the minor out of the keeping of the guardian *without the guardian's consent* and that the consent of the minor is wholly immaterial.

2 W. R. (Cr.) 5, 2 W. R. (Cr.) 61, 3 W. R. (Cr.) 15, 7 W. R. (Cr.) 36, 7 W. R. (Cr.) 62, 7 Cr. L. J. 210 and 4 P. R. (Cr.) 902 (F. B.), referred to—also Mayne's Criminal Law of India, 4th edition, p. 571.

INDIAN PENAL CODE—*contd.*

Held also, that the consent of a guardian given on a misrepresentation of a fact is one given under a "misconception of fact" within the meaning of section 90 of the Penal Code and cannot therefore be useful as a "consent" under any section of the Code.

I. L. R. 36 Mad. 453, referred to.

Held further, that a misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a "fact" within the meaning of section 3 of the Evidence Act.

... .. No. 17 P. R. (Cr.) 1916.

(3). SECTIONS 97, 99, 103 AND 300, EXCEPTION 2.

Exceeding right of defence of property—murder.

The 5 accused and another (an absconder) went on a moonlight night, armed with *chavis* and *dangs* and assaulted 2 persons who were cutting accused's rice crop, one of whom received 6 distinct fractures of the bones of the skull besides a number of other wounds and was killed on the spot. The accused had strong motive for injuring the deceased.

Held, that having regard to sections 97, 103 and the *fourth* paragraph of section 99 of the Penal Code, it was clear that the accused had inflicted more harm than was necessary for the purpose of defence of their property.

Held also, that it was impossible to hold that the accused did not intend to cause more harm than was necessary for defence of their property, and from this it followed that they, in using violence to deceased, did not act in good faith though they exceeded their rights and consequently exception 2 of section 300 was not applicable and they were guilty of the offence punishable under section 302.

29 P. R. (Cr.) 1902 and *I. L. R. 36 Cal. 296*, distinguished.

... .. No. 35 P. R. (Cr.) 1916.

(4) SECTIONS 147 AND 325.

Whether separate sentences are justified where the causing of the hurt turned the assembly into a riot—power of Sessions Judge on appeal, on setting aside one conviction, to enhance the other sentence—Criminal Procedure Code, Act V of 1898, section 423.

Held, following 4 P. R. (Cr.) 1901, that where the use of violence and the causing of hurt was the thing which turned the assembly of the accused persons into an unlawful assembly and turned that unlawful assembly into a riot, separate convictions under sections 147 and 325 of the Penal Code are not justified.

Held also, that a Sessions Judge on appeal, setting aside the conviction under section 325, Penal Code, with a separate sentence attached, has no power to enhance the sentence under section 147, *vide* section 423 of the Code of Criminal Procedure.

I. L. R. 22 Bom. 760 and *I. L. R. 30 Mad. 48*, referred to.

... .. No. 31 P. R. (Cr.) 1916!

NDIAN PENAL CODE—*contd.*

(5). SECTIONS 326, 457, 458 AND 460.

House-breaking followed by stabbing.

The facts found were that the two appellants broke into the house of one T. S. at night with intent to commit theft, armed with deadly weapons, left the house on an alarm being raised and in the courtyard stabbed one R. S. who tried to seize them, injuring him so that he died later on, and that they were pursued and captured some 700 *karams* from the village.

Held, that as the stabbing was done *after* the house-breaking was complete section 460 of the Penal Code did not apply, but that the appellants were guilty of offences under sections 457, 458 and 326.

17 P. R. (Cr.) 1876 and 2 P. R. (Cr.) 1882, referred to.

... .. No. 27 P. R. (Cr.) 1916.

(6). SECTION 366.

Conviction of young girl, 13 or 14 years of age—presumption of knowledge of consequences.

Held, that for an offence under section 366 of the Penal Code a special intent or knowledge is necessary, and that it could not be presumed that a young girl, 13 or 14 years of age, had the specific intent or knowledge, and if she did help to deceive the abducted girl in this case she must have done so at the instance of her brother and without any knowledge of the probable consequences, and her conviction was consequently improper.

... .. No. 13 P. R. (Cr.) 1916.

(7). SECTION 399.

Making preparations for committing a dacoity—whether necessary to shew the part taken by each member of the gang.

Held, that altho'gh the mere assemblage to commit dacoity does not amount to "preparation" within the meaning of section 399 of the Penal Code, the Court was justified in holding in this case from the facts found, *viz.*, that the members of the gang had taken into their possession instruments for house-breaking and arms for the purpose of offence and defence and had actually proceeded to a place near the scene of contemplated dacoity, that the members of the assembly had got ready for the actual commission of dacoity, and they were consequently guilty of the offence specified in the section.

Also that it was not necessary that the prosecution should point out the exact part taken by each member of the gang as regards preparation, provided that it is shown that the accused were members of a gang which had made in fact preparation for dacoity.

I. L. R. 41 Cal. 350 (357), referred to.

... .. No. 6 P. R. (Cr.) 1916.

INDIAN PENAL CODE—*concl'd.*

(8). SECTIONS 442, 443, 451 AND 453.

House-trespass—lurking house-trespass.

The appellant was caught at night in the courtyard of complainant's *haveli* under circumstances which shewed that he had come there in order to commit theft of cattle. Appellant had entered the courtyard through the *deorhi* which had no door attached to it and therefore there was no house-breaking.

Held, that in order to constitute *lurking* house-trespass, the offender must take some active means to conceal his presence and as there was no proof of this in the present case the appellant was not guilty of the offence of *lurking* house-trespass but was punishable under section 451, Part II of the Penal Code.

16 P. R. (Cr.) 1889, referred to.

... .. No. 2 P. R. (Cr.) 1916.

J

JURISDICTION (CRIMINAL).

(1). Prosecution under Municipal Act on complaint by person, not duly authorised, is without jurisdiction.

See Punjab Municipal Act, 1911 (1).

... .. No. 8 P. R. (Cr.) 1916.

(2). *Printing book at Lahore—infringement of copyright—whether triable at Gujranwala—Indian Copyright Act, III of 1914, section 7 (a)—Criminal Procedure Code, Act V of 1898, sections 177 and 179—loss caused to complainant at Gujranwala.*

Held, that a person charged with an offence under section 7 (a) of the Indian Copyright Act, by reason of having printed a certain book for sale at Lahore, can only be tried for the offence at Lahore, *vide* section 177 of the Code of Criminal Procedure.

Held also, that section 179 of the Code had no application to the case as the section embraces only such consequences as modify and complete the act alleged to be an offence, and loss to the complainant is not an essential ingredient of the offence described in section 7 of the Copyright Act.

... .. No. 28 P. R. (Cr.) 1916.

L

LURKING HOUSE-TRESPASS.

What constitutes.

See Indian Penal Code (8).

... .. No. 21 P. R. (Cr.) 1916.

0

OPIUM ACT, 1878.

SECTION 9, CLAUSES (c) AND (e).

What constitutes offence—appeal by Government against acquittal.

The facts found were that the accused N. was searched on entering the train for Delhi at Abohar but only a legitimate amount of opium was found on him. At the next station A., servant of N.'s, who was about to enter the train there, was searched and on him was found concealed in his bedding 10 seers 6 chittaks of opium. A. admitted this but said he carried it on behalf of his master, while N. asserted that he knew nothing about the matter and that A.'s possession was on his own account. Upon these facts the Magistrate convicted N. not only of being in possession of opium unlawfully but also of exporting the same unlawfully. These convictions were set aside by the Sessions Judge on appeal and against this acquittal the Government preferred an appeal to the Chief Court.

Held, that having regard to the definition of the term "export" in section 3 of the Opium Act it was clear that N., even if he was in possession of the opium through his servant, was not guilty of the offence of "exporting" opium under clause (c) of section 9 of the Act.

Held also, that the learned Sessions Judge, following *I. L. R. 39 Cal. 344* was right in holding that as the opium was found in the possession of A. it was for the prosecution to prove affirmatively and clearly that the possession of A. was merely that of a servant acting under the authority of his master N., and as his finding that this had not been proved was reasonable, there was no ground for setting aside his judgment of acquittal.

7 P. R. (Cr.) 1904 (p. 24), referred to.

... .. No. 15 P. R. (Cr.) 1916.

P

POLICE.

Same admission (said to have led to discovery of certain facts) made by several accused persons—necessity for strict proof of statement of each accused.

See *Indian Evidence Act*, 1872 (2).

... .. No. 7 P. R. (Cr.) 1916.

PUNJAB EXCISE ACT, 1914.

SECTION 61.

First offender under this Act should not be dealt with under section 562, Code of Criminal Procedure.

See *Criminal Procedure Code*, 1898 (15).

... .. No. 19 P. R. (Cr.) 1916

PUNJAB MUNICIPAL ACT, III OF 1911.

(1) SECTIONS 114 AND 219.

Notice by Committee to repair building in dangerous state—particulars necessary—insufficient notice vitiates criminal proceedings.

Petitioner was convicted under section 219 of the Punjab Municipal Act for disobedience of a written notice under section 114. The notice, after mentioning the building called upon the petitioner to remove it or to execute "sufficient" repairs to such portion of the building as was in a ruinous or dangerous condition.

Held, that the notice under section 114 was bad, inasmuch as it did not specify the portion of the building which, in the opinion of the committee, was in a dangerous condition nor the nature of repairs required to be made, and that this defect vitiated the conviction under section 219.

5 P. L. R. 1914 (Cr.) and 3 P. R. (Cr.) 1912, referred to.

... .. No. 9 P. R. (Cr.) 1916.

(2) SECTION 228, EXPLANATION.

Whether authority to prosecute given to persons by office, other than those mentioned in the explanation, is valid.

Held, that authority given by a Municipal Committee to the *Darogha Sa'ai* (by office and not by name) to prosecute an offender under the Punjab Municipal Act is invalid—*vide* section 228, explanation, and the conviction obtained in such prosecution is consequently without jurisdiction and bad for want of a proper complaint.

... .. No. 8 P. R. (Cr.) 1916.

R

RES JUDICATA.

Application by wife for maintenance on ground of cruelty, once disallowed, bars subsequent application on same ground.

See *Criminal Procedure Code*, 1898 (13).

... .. No. 24 P. R. (Cr.) 1916.

REVIEW.

Of judgment by a Criminal Court—not competent.

See *Criminal Procedure Code*, 1898 (8).

... .. No. 25 P. R. (Cr.) 1916.

REVISION (CRIMINAL).

(1) Competent where a Magistrate has wholly disregarded the provisions of section 145, Criminal Procedure Code.

See *Criminal Procedure Code*, 1898 (3).

... .. No. 22 P. R. (Cr.) 1916.

REVISION (CRIMINAL)—*concl'd.*

(2) Against sanction to prosecute granted by successor of a Munsiff before whom alleged offence was committed—competent, although no appeal was made against the order of sanction.

See *Criminal Procedure Code*, 1898 (6).

No. 23 P. R. (Cr.) 1916.

S

SANCTION TO PROSECUTE.

(1) Cannot be granted by successor of the Munsiff before whom the alleged offence was committed and without notice to accused—power of Chief Court to revise order although it was not appealed against.

See *Criminal Procedure Code*, 1898 (6).

No. 23 P. R. (Cr.) 1916.

(2) May be given by Magistrate against a witness who made a false statement before him on oath in proceedings under section 100, Criminal Procedure Code

See *Criminal Procedure Code*, 1898 (1).

No. 34 P. R. (Cr.) 1916.

SECURITY FOR GOOD BEHAVIOUR.

Witnesses cannot be recalled for cross-examination in proceedings for—

See *Criminal Procedure Code*, 1898 (2).

No. 1 P. R. (Cr.) 1916.

SELF-DEFENCE.

Exceeding right of defence of property.

See *Indian Penal Code*, (3).

No. 35 P. R. (Cr.) 1916

W

WITNESSES.

Recall of, for cross-examination, in proceedings under section 110, Criminal Procedure Code.

See *Criminal Procedure Code*, 1898 (2).

No. 1 P. R. (Cr.) 1916,

WORKMEN'S LIABILITY ACT, XIII OF 1859.

Obtaining an advance on agreement to pay it off by delivering ballast.

Held, that an agreement by which the accused received an advance of money from the complainant and contracted to pay it off by delivering ballast did not constitute the relationship of labourer and employer of labour between the parties and the provisions of Act XIII of 1859 were, consequently, inapplicable to the case.

No. 2 P. R. (Cr.) 1916

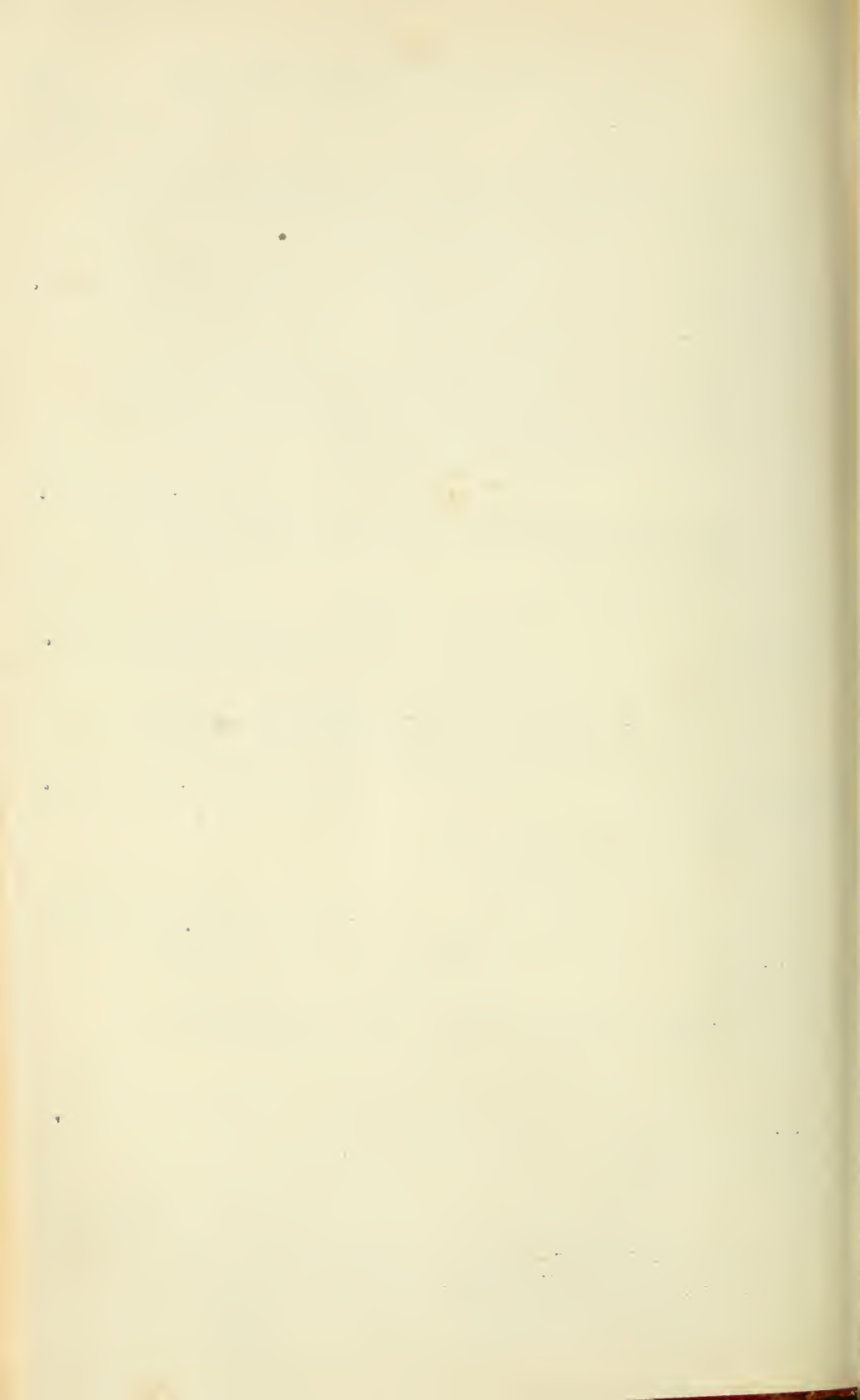


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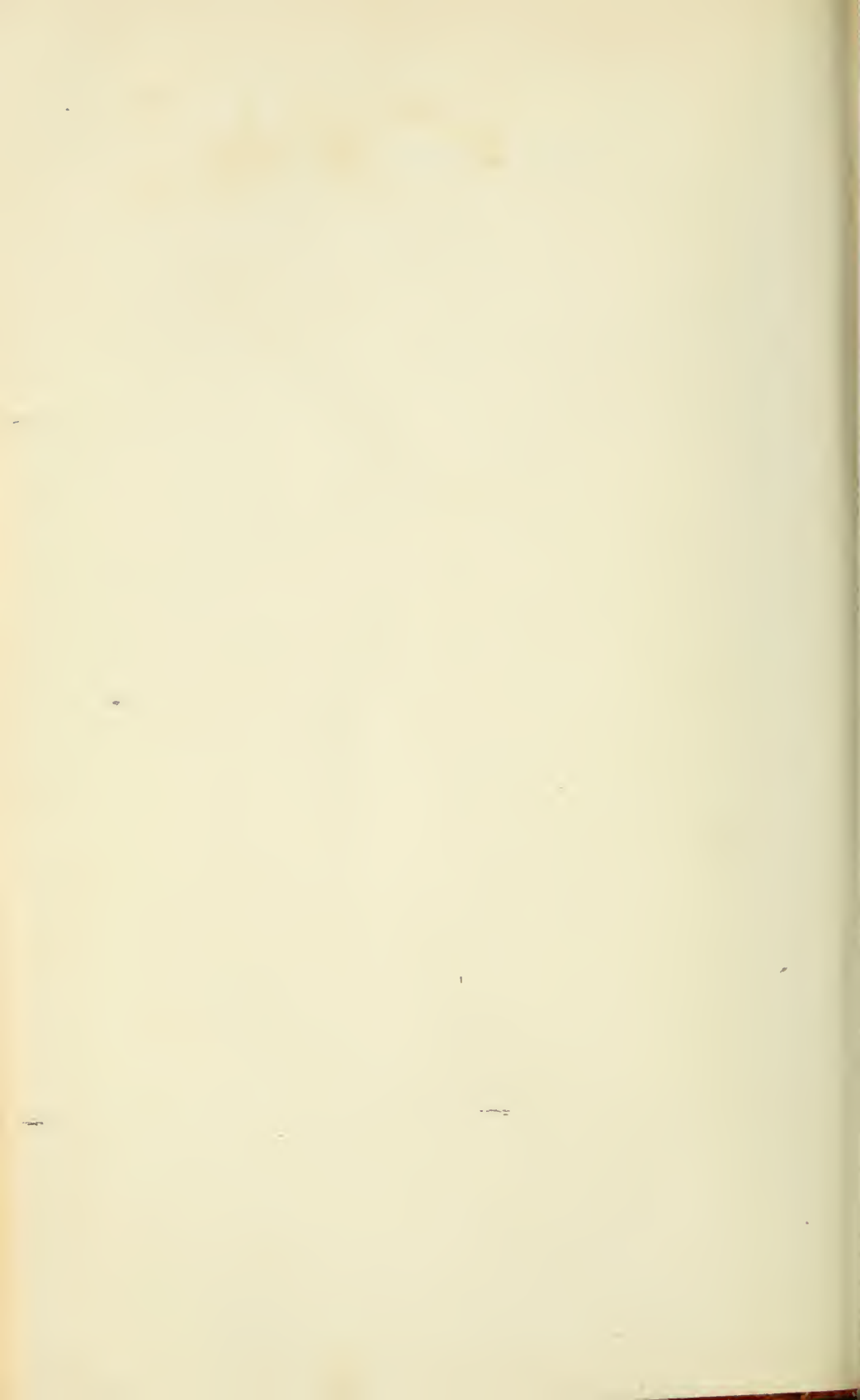
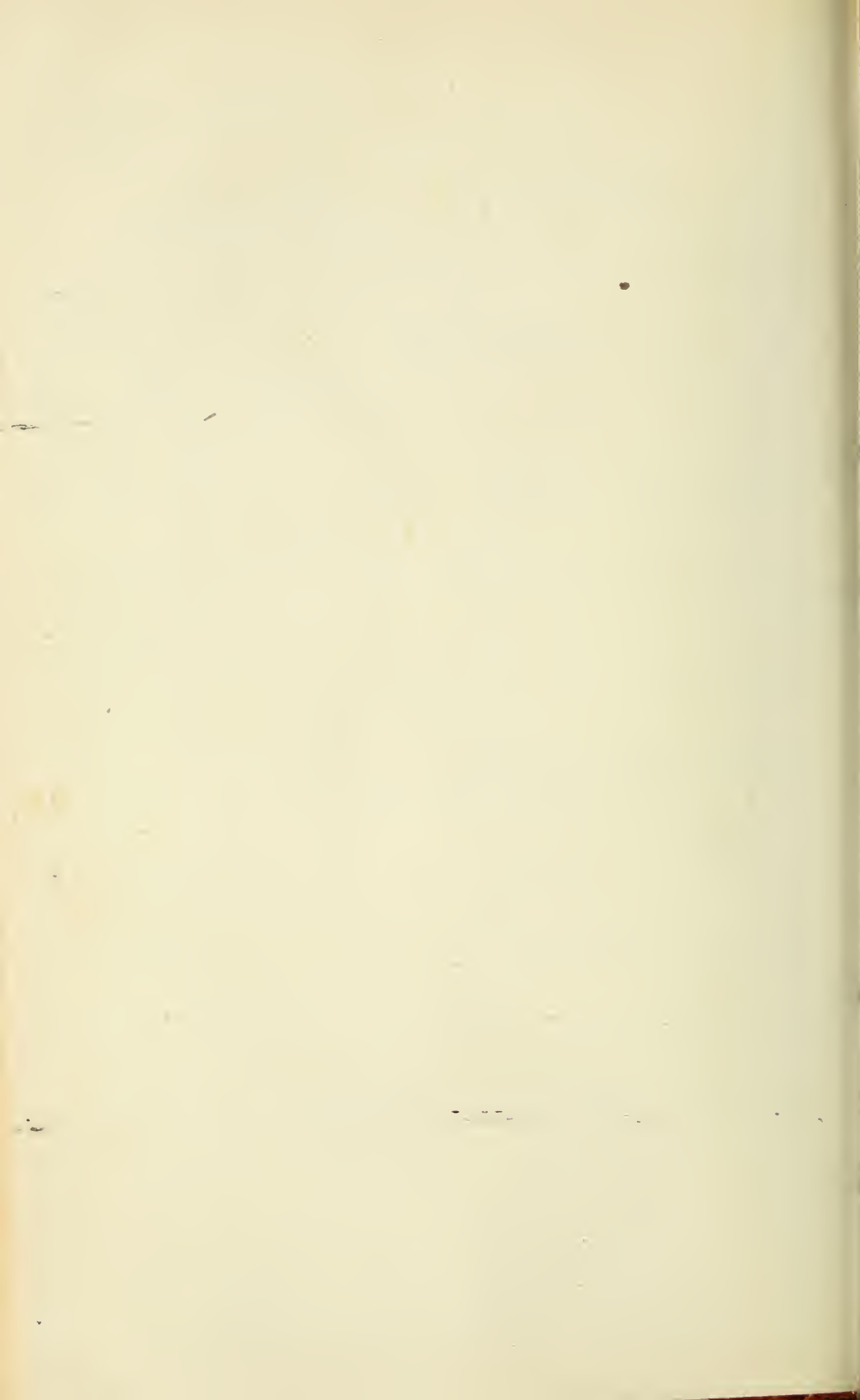


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CTS.

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IX OF 1908—See *Indian Limitation Act*, 1908.

I

INDIAN LIMITATION ACT, IX OF 1908.

ARTICLES 120 AND 144.

Limitation for suit by landlord to dispossess alienee of occupancy rights.

Held (differing from 3 *P. R. (Rev.)* 1910) that the limitation for a suit by a landlord to dispossess a person to whom occupancy rights have been sold is six years from the date of the sale under article 120 of the Limitation Act, and that article 144 of the Act has no application to such a suit.

9 *P. R.* 1904, 135 *P. R.* 1888, 1 *P. R. (Rev.)* 1898, 7 *P. R. (Rev.)* 1905 and 6 *P. R. (Rev.)* 1893, referred to.

... .. No. 1 *P. R. (Rev.)* 1916.

L

IMITATION.

For suit by landlord to dispossess alienee of occupancy rights.

See *Indian Limitation Act*, 1908.

... .. No. 1 *P. R. (Rev.)* 1916.

M

AFIDAR.

Whether entitled to a share in produce from owner in possession of the land.

This suit was brought by a mafidar against the recorded proprietor, who was in cultivating possession, for the value of one-half share of produce for Kharif 1912. The *mafi* was originally granted by Maharaja Ranjit Singh to the father of plaintiff "*ba sgha dharmarth aur ba*

MAFIDAR—*concl'd.*

iwaz puja path." It was confirmed for life after annexation in 1849, resumed on death of the mafidar in August 1862, but was again released in June 1863 in favour of his son, the present plaintiff, who had apparently enjoyed it continuously up to the present.

Held, that an assignee of land revenue, as such, is not entitled to land revenue in the form of a share of the produce, nor is the mere receipt by him of such a share in the past sufficient to give him a title to such share in the future, unless he can shew that, in addition to the position of mafidar or assignee, his *status* includes certain elements or incidents of proprietary right or ownership explained in rule D. I. 3 I. framed under the Land Revenue Act of 1871 on the analogous subject of the settlement of the revenue assessable on resumed assignments with the ex-assignees or their heirs, a subject now dealt with in para. 183 of the Settlement Manual on the principles underlying the rules of 1871.

Also, that if the owner is in cultivating possession of the land concerned, the nature, origin and duration of such possession are matters for consideration in determining the extent of the mafidar's rights.

10 *P. R. (Rev.)* 1886, 4 *P. R. (Rev.)* 1887, 2 *P. R. (Rev.)* 1889 and 14 *P. R. (Rev.)* 1892, referred to.

1 *P. R. (Rev.)* 1885, dissented from.

Held further, that as in this case it had not been proved that the plaintiff assignee had any proprietary interest of the kind specified in 10 *P. R. (Rev.)* 1886, or had at any time ejected tenants or admitted new ones, and it was found that the owner had been uninterruptedly in cultivating possession since 1862 the suit for a share of produce must fail, notwithstanding that such share had been more or less regularly paid by the defendant since 1862.

... .. No. 2 *P. R. (Rev.)* 1916.

0

OCCUPANCY RIGHTS.

Limitation for suit by landlord to dispossess alienee of—

See *Indian Limitation Act*, 1908.

... .. No. 1 *P. R. (Rev.)* 1916.

P

PUNJAB TENANCY ACT, 1887.

SECTION 5 (1) (c).

Settlement of tenant "by the founder" and "along with the founder."

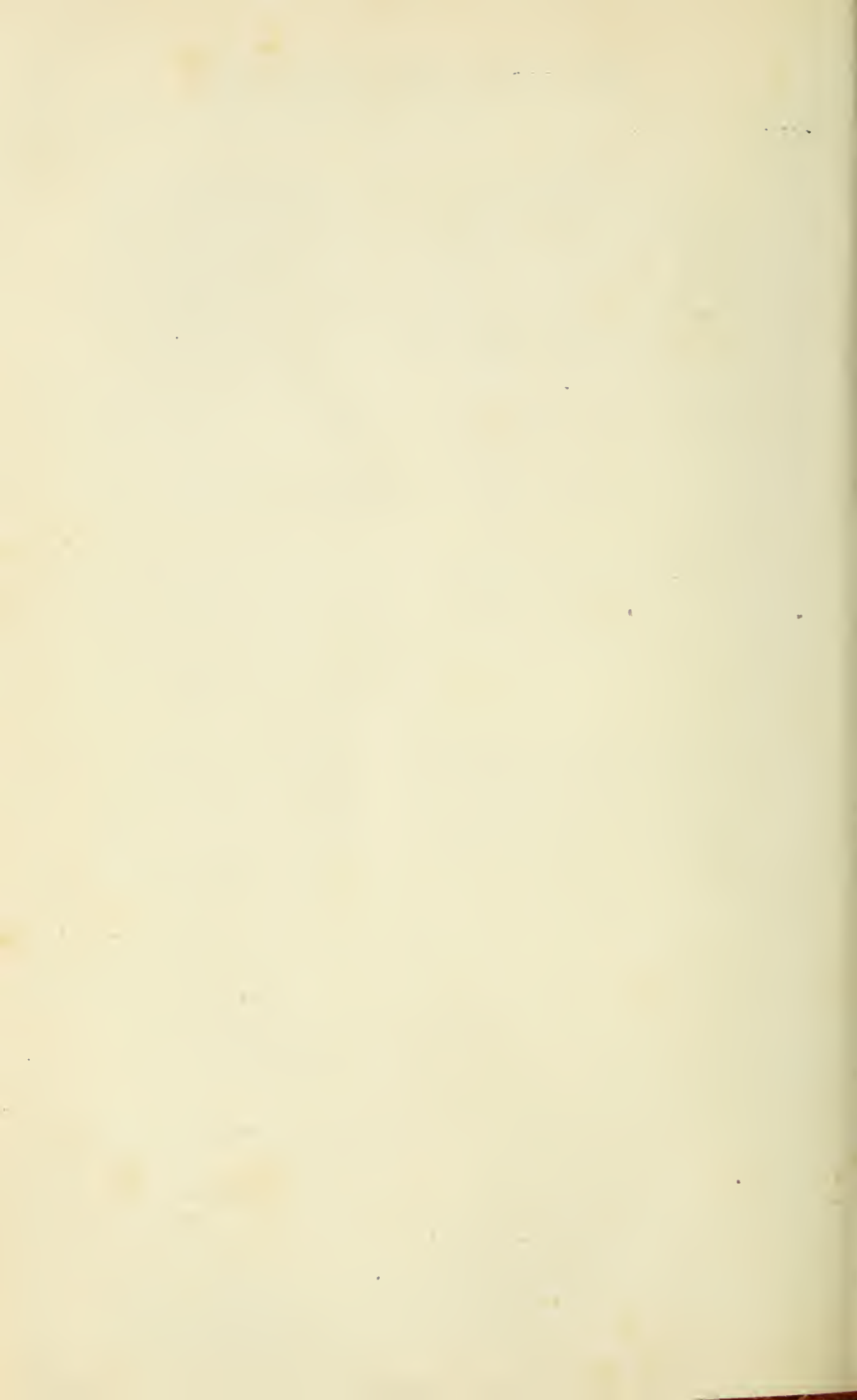
Held, that the meaning of settlement "along with the founder" in section 5 (1) (c) of the Tenancy Act is settlement contemporaneously or in association with the original founder during the initial stages of foundation and development of the village.

94 *P. R.* 1880, referred to.

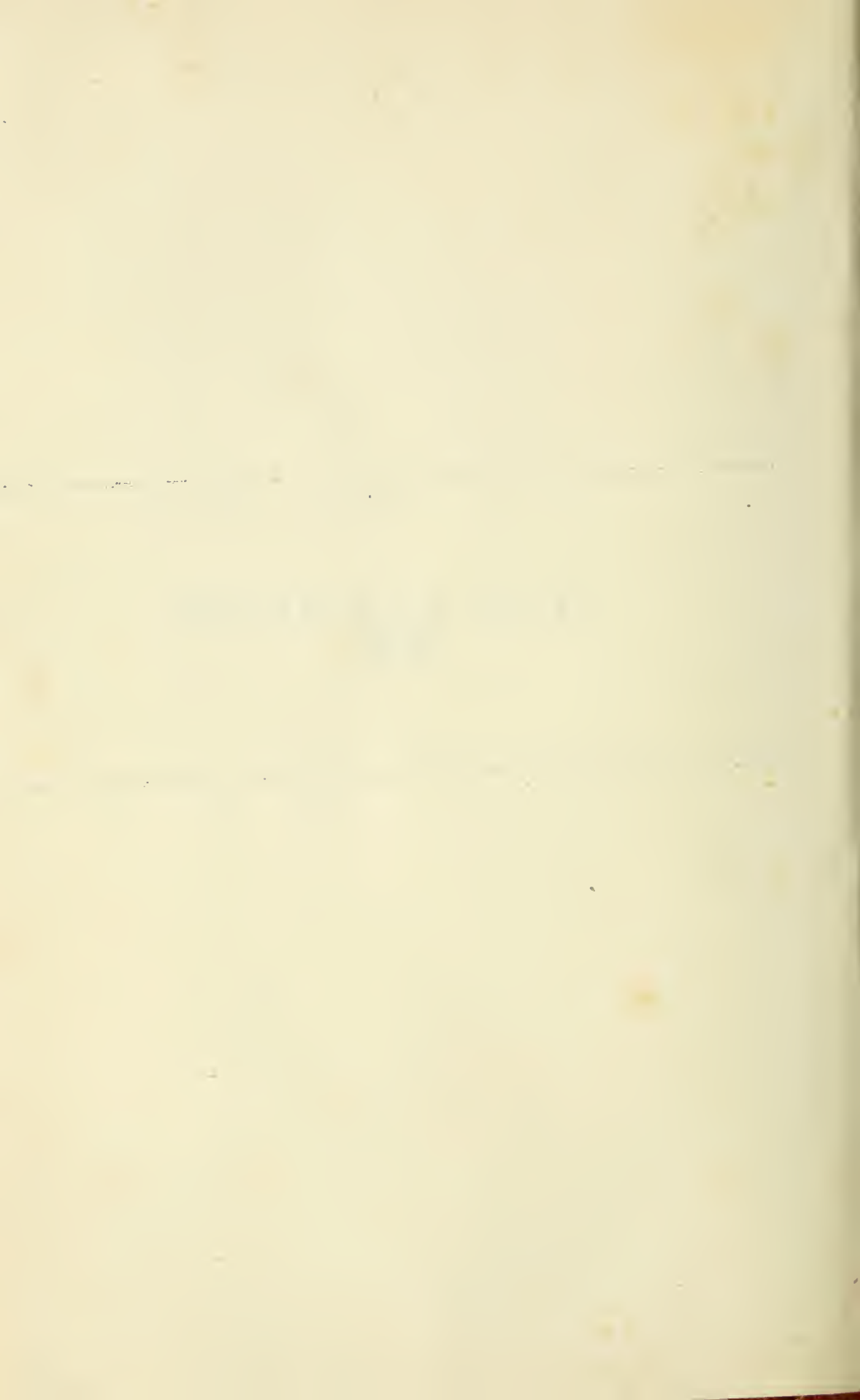
PUNJAB TENANCY ACT, 1887—*concl'd.*

But that settlement, by the founder might take place after those stages had passed, and accordingly where a cultivator is shown to have commenced to reside, and to cultivate *shamilat* land, in a village during the lifetime of a founder thereof, such founder being at the time *lam-bardar* or otherwise directly concerned with the management of the *shamilat* there is a fair presumption that the cultivator in question was settled in the village "by the founder thereof as a cultivator therein," rebuttable of course, by adequate proof of facts inconsistent with, or contradicting, such presumption.

... No. 3 P. R. (Rev.) 1916.



CIVIL JUDGMENTS,
1916.



Chief Court of the Punjab.

CIVIL JUDGMENTS.

No. 1. ✓

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

GOKAL CHAND—(DEFENDANT)—APPELLANT,

Versus

NIADAR MAL—(PLAINTIFF)—AND OTHERS—(DEFENDANTS)
—RESPONDENTS.

Civil Appeal No. 689 of 1912.

Res-judicata—where previous suit was dismissed on ground of limitation only—Indian Limitation Act, IX of 1908, section 28 and schedule I—whether applicable to defences.

One N. M. purchased a house which was sold by a receiver authorised to sell in order to clear off certain debts. N. M. got possession of it with the exception of two *kothris* which were locked up. One G. C. sued in 1911 for cancellation of the sale but his suit was dismissed as time-barred. N. M. then brought the present suit for possession of the *kothris* and G. C. resisted the claim on the ground that the sale was not binding on him. The lower Appellate Court held that G. C. having failed to get the sale set aside within the period allowed by law, could not impeach it now.

Held, that the decision in the previous suit of 1911 could not be regarded as *res judicata* as nothing was decided in that case, which was dismissed simply on the score of limitation.

Held also, that the defence could not be time-barred under schedule I of the Limitation Act, as that schedule only provides periods of limitation within which "suits" must be brought, or under section 28, as G. C. had not been out of possession for a period exceeding that which the law would allow him for bringing a suit to recover possession and that, consequently, plaintiff must prove his right to dispossess him.

Second appeal from the decree of Lieutenant-Colonel G. C. Beadon, Divisional Judge, Ambala Division, dated the 6th February 1912

Sundar Das, for Appellant.

Sheo Narain, for Respondent.

The Judgment of the Court was delivered by—

CHEVIS, J.—The late Dhani Ram had three sons, Bindraban, 12th April 1915.
Munshi Ram and Gokal Chand, of whom the last named is the present appellant. In 1908 Ghamandi Lal, etc, got a decree against Bindraban, Munshi Ram and their sons for Rs 2,727.

Soon after the decree Udho Ram, who had been appointed a receiver and had been authorised to sell certain property in order to clear off debts, sold a house belonging to the brothers to Niadar Mal and with the sale money paid off the decree-holders. Niadar Mal got possession of the house with the exception of two *kothris* which were locked up, and for these two *kothris* Niadar Mal has now sued. Gokal Chand in 1911 sued the Secretary of State, Niadar Mal and others for cancellation of the sale effected by Udho Ram, but this suit was dismissed as time-barred. In the present suit brought by Niadar Mal for possession of the *kothris* Gokal Chand again resists the claim on the ground that the sale is not binding on him. The lower Courts have decided the case against him. So Gokal Chand appeals to this Court.

The learned Divisional Judge holds that Gokal Chand, having failed to get the sale set aside within the period allowed by law, cannot impeach it now.

We are of opinion that this decision is incorrect. The matter in dispute certainly cannot be regarded as *res judicata*, for nothing was decided in the former case which was dismissed simply on the score of limitation. And as to the defence in the present case being time-barred we note that Gokal Chand is not the plaintiff in this case and the 1st schedule to the Limitation Act only provides periods of limitation within which suits must be brought. It does not provide periods of limitation for defences. Section 28 of the Limitation Act is also no bar, as that section merely provides that at the determination of the period allowed by law to any person for instituting a suit for possession of any property his right to such property shall be extinguished. This however is not a case in which Gokal Chand has been out of possession for a period exceeding that which the law would allow him for bringing a suit to recover possession. On the contrary, it appears that Gokal Chand has all along held possession, or at least part possession, of the two *kothris* which are the subject-matter of this suit. Plaintiffs are now seeking to dispossess him and they must prove their right to do so.

We accept the appeal and remand the case to the District Judge under order XII, rule 23, for decision on the merits. Stamp on appeal to this Court will be refunded. Other costs of this appeal will be costs in the cause.

Appeal accepted.

No. 2.

*Before Hon. Mr. Justice Shadi Lal and Hon. Mr.
Justice Leslie Jones.*

MUHAMMAD ISHAQ KHAN—(DEFENDANT)—
APPELLANT,

Versus

MUHAMMAD ISLAM-ULLAH KHAN AND OTHERS—
(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1449 of 1913.

*Jurisdiction—Civil Procedure Code, Act V of 1908, section 20 (c)—
Pro-note not expressly payable at Delhi but delivered there to the payee—
presumption of its being payable there—Jurisdiction of Delhi Court.*

The plaintiff sued at Delhi for recovery of money due on a promissory note in her favour executed by the defendant at Fatehgarh in the United Provinces and sent by him from that place to plaintiff at Delhi where she had her residence and where it was accepted by her in settlement of her claim against defendant. The pro-note did not expressly prescribe any place for its performance.

Held, that the defendant by delivering the pro-note at Delhi impliedly promised to pay the money at that place which view was supported by circumstances and some of the evidence on the record and consequently the Delhi Court had jurisdiction to try the suit—*vide* section 20, clause (c) of the Code of Civil Procedure.

1 B. L. R. 35 (1), distinguished.

1 Mad. H. C. R. 202 (2), referred to.

*Second appeal from the decree of S. Clifford, Esquire, Additional
Divisional Judge of Delhi, dated the 28th of April 1913.*

Muhammad Shafi, for Appellant.

Moti Sagar, for Respondents.

The Judgment of the Court was delivered by—

SHADI LAL, J.—This is a suit for the recovery of money 18th June 1915, on the basis of a promissory note for Rs. 3,000 executed on the 6th of August 1906 by the defendant Nawab Muhammad Ishaq Khan at Fatehgarh in the United Provinces, and sent by him from that place to his brother's widow at Delhi. The money was due to her on account of her share of the income from the property owned by her husband in the United Provinces, and the pro-note was accepted by her in full settlement of her claim against the defendant in regard to the

(1) (1867) 1 B. L. R. 35 (*Ramgopal v. Richard*).

(2) (1863) 1 Mad. H. C. R. 202 (*Winter v. Round*).

profits realised by him on her behalf. The Courts below have concurred in decreeing the claim and the only question, which has been argued before us and which requires determination in this second appeal, is whether the Delhi Court had or had not the jurisdiction to try the suit.

Now it is beyond dispute that the defendant resides, and the pro-note was executed, outside the local limits of the jurisdiction of the Court and it is therefore clear that neither the rule based upon the residence of the defendant nor the rule of *locus contractus* can be invoked for establishing the jurisdiction of the Delhi Court, and the sole ground, upon which the plaintiffs seek to sustain the jurisdiction, is that in performance of the contract, the money was payable at Delhi. This contention has been accepted by both the Courts below and it is manifest that if established it brings the case within the purview of section 20, clause (c) of the Civil Procedure Code of 1908, which clause reproduces in a succinct form the principle contained in explanation 3 to section 17 of the old Code.

We observe that the contract itself does not expressly prescribe any place for its performance, but we think that the circumstances of the case show that the parties intended that the contract should be fulfilled at Delhi. The document, it is to be noted, was delivered by post to the lady at Delhi and it was there that it was accepted in settlement of her claim. The judgment in 1 Bengal Law Report 35 (1), cited by the learned pleader for the respondents, is distinguishable on the ground that the pro-note in that case was executed within jurisdiction but the ruling, which is to some extent applicable to the present case, is that reported in 1 Madras High Court Report 202 (2). As observed in that judgment, the making of a pro-note is altogether the act of the maker and it requires delivery to the promisee to render it complete. It may therefore be said that the defendant by delivering the note at Delhi impliedly promised to pay the money at that place.

But this is not the only circumstance which lends support to the view that there was an implied undertaking on the part of the defendant to perform the contract within jurisdiction. The learned Divisional Judge has stated in his judgment that the widow, after the death of her husband, apparently left his house and came to Delhi to reside with her brother

(1) (1867) 1 B. L. R. 35 (*Ramgopal v. Richard*).

(2) (1863) 1 Mad. H. C. R. 202 (*Winter v. Round*).

Khan Bahadur Muhammad Ikram Ullah Khan. It is true that there is no direct evidence in support of this statement but the plaintiffs legitimately contend that this is a reasonable inference to be deduced from all the letters on the record, more especially when the defendant has not adduced any evidence to negative that inference. At any rate, it is incontestable that she was living in 1906 at Delhi and that the pro-note was delivered to her there. Further it was obviously from Delhi that she made demands upon the defendant for the payment of the debt due to her and it is significant that in one of the letters, namely P. 7, which is proved by the witness Muhammad Unis to be in the hand-writing of the defendant, the latter distinctly stated that he could not get money to discharge the claim on the pro-note, otherwise he would have remitted to her Rs 3,000 minus such sum as was due to him by her on account.

In these circumstances, the Courts below were justified in holding that there was sufficient *prima facie* evidence to prove an implied agreement that the defendant should send the money due on the pro-note to the promisee at Delhi. It is to be observed that both the widow and her brother Khan Bahadur Muhammad Ikram Ullah Khan are dead and the person, who is now in a position to give information on the matter, is the defendant but he has not thought fit to go into the witness box and give his version of the affair. Having regard to the place of the delivery of the pro-note and other considerations set out above we are of opinion that the parties intended the payment to be made at Delhi. The Delhi Court, being the *forum loci solutionis*, had consequently jurisdiction to entertain and adjudicate upon the claim based upon the pro-note.

On this view it is not necessary to consider whether there was "a consequent failure of justice" within the meaning of section 21, Civil Procedure Code of 1908, and whether the provisions of that section operate as a bar to the objection as to the territorial jurisdiction of the Delhi Court.

Our decision on the only point urged in this second appeal is against the appellant and it therefore follows that this appeal must be dismissed with costs.

Appeal dismissed.

No. 3.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice
Leslie Jones.

INAYAT—(PLAINTIFF)—APPELLANT,

Versus

GANGA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1472 of 1913.

Abatement—of appeal against all respondents on death of one respondent and failure to bring his representatives on the record within time—ignorance of law—no excuse.

In this case the plaintiff sued for possession of certain land alleging that it had been mortgaged by his father to the ancestor of the 20 defendants and that the mortgage debt had been discharged and he also claimed a declaration of his title as proprietor in the *shamilat* appertaining to the area under mortgage. The first Court dismissed the suit. The plaintiff appealed and at the hearing it transpired that one of the respondents had died more than six months before the appeal came on for hearing and thereon the Court rejected the appeal as against all the respondents. The plaintiff then preferred a second appeal to the Chief Court.

Held, that appellant had failed to prove that he was not aware of the death of the respondent until such time as it was practically impossible for him to file an application within the period of six months from the date of death.

Held also, that ignorance of the law is not a sufficient cause for not presenting the application.

41 P. R. 1915 (1) and 204 P. L. R. 1912 (2), referred to.

113 P. R. 1907 (3), distinguished.

Held further, that as the suit could not have proceeded at all unless the respondent (since deceased) in his capacity as a co-mortgagee had been impleaded in the first instance the lower Appellate Court was right in holding that the appeal abated *in toto*.

I. L. R. 22 Bom. 718 (4), I. L. R. 26 Bom. 203 (5) and I. L. R. 34 Cal. 1020 (6), disapproved.

41 P. R. 1915 (1) and I. L. R. 22 All. 430 (7), referred to.

Second appeal from the decree of B. H. Bird, Esquire, Additional Divisional Judge, Shahpur Division, at Lyallpur, dated the 18th April 1913.

Nabi Bakhsh, for Appellant.

Bahadur Chand, for Respondents.

The Judgment of the Court was delivered by—

19th June 1915.

LESLIE JONES, J.—Inayat, the plaintiff in this case, sued for possession of certain land attached to the Kotliwala well in the village of Natharke in the Jhang District, alleging that it

(1) 41 P. R. 1915 (*Hadu v. Lala*).

(2) 204 P. L. R. 1912 (*Karam Chand v. Lehna*).

(3) 113 P. R. 1907 (*Dadu v. Kadu*).

(4) (1897) I. L. R. 22 Bom. 718 (*Chandarsang v. Khimabhai*).

(5) (1901) I. L. R. 26 Bom. 203 (*Bai Full v. Adesang*).

(6) (1907) I. L. R. 34 Cal. 1020 (*Upendra Kumar v. Sham Lal*).

(7) (1900) I. L. R. 22 All. 430 (*Uem Kumcar v. Amba Prasad*).

had been mortgaged by his father to Diwan Chand, the ancestor of the 20 defendants, and that the mortgage debt had been discharged. He also claimed a declaration of his title as proprietor in the *shamilat* appertaining to the area alleged to have been mortgaged.

The first Court finding that the mortgage set up by the plaintiff never had any existence in fact and that the defendants were in possession as owners, dismissed the suit.

The plaintiff appealed to the Additional Divisional Judge. It then transpired that Sukhu, one of the respondents, who had been served with notice of the appeal on the 31st May 1912, had died before the appeal came on for hearing on the 8th April 1913. Ahmad, the agent of the plaintiff-appellant, first stated that Sukhu had died from one to one and a half months after the appeal was instituted. Makhan, the cousin of Sukhu, however, informed the Judge that Sukhu had died on the 2nd September 1912, or more than six months before the appeal came on for hearing.

Admittedly Sukhu left a minor son, named Ladhu, as his representative and it was, therefore, objected that as Ladhu had not been brought on the record, the whole appeal must abate. The Additional Divisional Judge heard arguments on 10th April 1913. On the following day Ahmad, the agent of the plaintiff-appellant, filed an application asking that Ladhu might be brought on the record. In this application he stated that he had learnt of the death of Sukhu long after the date of his death and that he was not aware that it was legally necessary to bring Sukhu's representative on the record.

This application was considered by the Additional Divisional Judge in his judgment dated the 18th April 1913. He remarked that it was clear that the appellant was aware of Sukhu's death, and held further that ignorance of the law of limitation was not a sufficient cause for failing to bring a representative on the record within time. For these reasons he allowed the objection of the respondents and dismissed the appeal.

The plaintiff has now preferred a second appeal to this Court. We are first asked by the counsel for the appellant to hold that the ignorance of the appellant as to the death of Sukhu was a sufficient cause for not bringing his legal representative on the record within time, 113 *P. R.* 1907 (1) being cited in support of this proposition. That was a case in which it was held that there were extenuating circumstances in

(1) 113 *P. R.* 1907 (*Dadu v. Kadu*).

respect of the delay and sufficient cause. In the present case, although apparently Sukhu was not living in his village of origin which is the same as that of the plaintiff, at the time of his death he was only 12 miles away in a colony chak where he was engaged in keeping a shop. If Sukhu died in September 1912, and the date of his death is not disputed, the probability is that the plaintiff was aware of it long before six months had elapsed. The statement of his agent that he was not aware of Sukhu's death until long after it had occurred was not made until he had had the advantage of hearing the arguments and had thus become alive to the importance of the plea of ignorance of death. Even so, it was for the plaintiff to show that he had not become aware of Sukhu's death until such time as it was practically impossible for him to file an application within the expiry of six months from the date of death, but even now the date of his knowledge is not given and from the first statement recorded by his agent there can be little doubt that he had ample notice of Sukhu's death. We are unable, therefore, to find that in this case the plaintiff is entitled to any extension due to ignorance of facts.

Secondly, as was pointed out in 41 *P. R.* 1915 (1) there is no authority to the effect that the ordinary law governing abatement should be departed from merely because a party says that he was not aware of that law, and 204 *P. L. R.* 1912 (2) is an express authority that ignorance of the law is not a sufficient cause. We must hold then that so far as the representative of Sukhu is concerned the appeal was rightly held to have abated.

But the further question remains whether it should be held to abate as against all the other respondents. In this connection counsel for the appellant has cited 22 *Bom.* 718 (3), 26 *Bom.* 203 (4) and 34 *Cal.* 1020 (5). 22 *Bom.* 718 (3) related to a case in which one of the defendant-appellants as well as one of the plaintiff-respondents had died before the appeal came on for hearing before the lower Appellate Court which held that applications to bring representatives on the record were barred by limitation, and then dismissed the appeal as being defective for want of parties.

It was held by the High Court that the surviving defendant-appellants had a right to proceed under section 544 of the Civil Procedure Code, and that as regards the plaintiff-respondent the Court ought, either to have held that the

(1) 41 *P. R.* 1915 (*Hadu v. Lala*).

(2) 204 *P. L. R.* 1912 (*Karam Chand v. Lehna*).

(3) (1897) *I. L. R.* 22 *Bom.* 718 (*Chandarsang v. Khimabhai*).

(4) (1901) *I. L. R.* 26 *Bom.* 203 (*Bai Full v. Adesang*).

(5) (1907) *I. L. R.* 34 *Cal.* 1020 (*Upendra Kumar v. Sham Lal*).

appeal abated as against him, and proceeded as against the rest of the respondents, or should have placed the legal representatives on the record.

It is to be noticed that the High Court did not discuss the question of limitation, or explain why, although the suit was one for the possession of land, it was considered that appeal would only partially abate.

26 *Bom.* 203 (1), merely follows 22 *Bom.* 718 (2), without further explanation, and 34 *Cal.* 1020 (3), though it cites 22 *Bom.* 718 (2), with approval merely does so with regard to an appeal by a defendant-appellant. We are unable to accept the proposition that a partial abatement never involves the abatement of a whole appeal.

There are as is pointed out in 41 *P. R.* 1915 (4), many authorities, to which may be added 22 *All.* 430 (5), to the effect that where the interests of defendant-respondents are joint, and the decree could not be reversed without the representative of the deceased respondent being brought on the record, the whole appeal must abate. We are not here in any way concerned with the facts discussed in 41 *P. R.* 1915 (4), but in the present case it is, we think, clear that the plaintiff's suit could not have proceeded at all unless Sakhu, in his capacity as a co-mortgagee, had been impleaded in the first instance, and that it would be useless now to give the plaintiff a decree which does not include Ladhu, who would still be entitled to hold the whole land in dispute.

We think that the lower Appellate Court was technically wrong in "dismissing" the appeal. We hold that it "abated" and modify the decree to that extent. But on its merits the appeal in this Court is dismissed and the appellant must pay costs.

Appeal dismissed.

No. 4.

*Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
LeRossignol.*

MUSSAMMAT JANNAT AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

ABDULLA—(PLAINTIFF)—OBEDULLA AND OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 619 of 1910.

*Custom—Alienation—Bhatti Rajputs of Mauza Kum, Tahsil Pind
Dadan Khan—Muhammadian Law—reversion of donated property to donor's*

(1) (1901) *I. L. R.* 26 *Bom.* 203 (*Bai Full v. Adesang*).

(2) (1898) *I. L. R.* 22 *Bom.* 718 (*Chandirsang v. Khimabhai*).

(3) (1907) *I. L. R.* 34 *Cal.* 1020 (*Upendra Kumar v. Sham Lal*).

(4) 41 *P. R.* 1915 (*Hadu v. Lala*).

(5) (1900) *I. L. R.* 22 *All.* 430 (*Hem Kunwar v. Amba Prasad*).

family in presence of sisters of last holder—consent of father to alienation—when not binding on son.

Held, that in matters of succession Bhatti Rajputs of *Mauza Kum, Tahsil Pind Dadan Khan*, follow custom and not Muhammadan Law.

Held also, that the presence of sisters of the last holder of donated property does not prevent its reversion to the donor's family, notwithstanding that they are daughters of the original donee.

84 P. R. 1909 (1), explained.

Held further, that the assent of the father of the plaintiffs to the alienation in dispute cannot be considered *bona fide*, so as to bind his descendants, where it was given merely because he wished the family to follow Muhammadan Law in future, after it had followed custom in the past.

59 P. R. 1904 (2), 7 P. R. 1905 (3), 35 P. R. 1907 (4), 37 P. R. 1907 (5), 78 P. R. 1908 (6) and 68 P. R. 1912 (7), distinguished.

Further appeal from the decree of T. P. Ellis, Esquire, Divisional Judge of the Ludhiana Division, dated the 16th day of May 1910.

Tek Chand, for Appellants.

Fazl-i-Hussain, for Respondents.

The Judgment of the Court was delivered by—

22nd June 1915.

LEROSSIGNOL, J.—The pedigree table given in the body of the judgment of the lower Appellate Court is lacking in some respects, so we append to this judgment a complete and corrected pedigree-table of the parties concerned with this case.

The dispute in this case concerns the property of Ismail, son of Ahmad Din, who died on the 30th June 1907. By the mutation which followed on his death his widow Mussammat Jannat secured three shares, his sisters Mussammat Khadija and Mussammat Ruqia secured between them 20 shares whilst one share was allotted to Muhammad, uncle of Ismail.

The present suit is brought by Abdulla for a declaration that this mutation which would seem to be based on Muhammadan Law and contravenes the provisions of agricultural custom shall not affect his reversionary rights. The first Court dismissed the suit on two grounds; first, because the plaintiff's father had assented to the mutation, and secondly, because the family of the parties is governed by Muhammadan Law. The District Judge on appeal reversed this decree, found that the parties had in the past observed not Muhammadan Law but

(1) 84 P. R. 1909 (*Gurdit Singh v. Mussammat Prem Kaur*).

(2) 59 P. R. 1904 (*Kaman v. Muhammad Ali*).

(3) 7 P. R. 1905 (*Labhu v. Mussammat Nihali*).

(4) 35 P. R. 1907 (*Lakha Singh v. Jota Singh*).

(5) 37 P. R. 1907 (*Deri Dial v. Utam Devi*).

(6) 78 P. R. 1908 (*Shib Ram v. Shib Singh*).

(7) 68 P. R. 1912 (*Habib Khan v. Muhammad*).

custom at any rate in the matter of succession, and decided that the consent of the plaintiff's father did not bind his son so as to preclude him from maintaining this suit.

The defendants have come to this Court in further appeal and on their behalf four main contentions are sustained.

First it is urged that this property was obtained by Ahmad Din by gift from Ala-ud-Din and that consequently even if the parties follow custom the plaintiff is not entitled to the decree he seeks because after Mussammat Jannat, widow of Ismail, Mussammat Khadija and Mussammat Ruqia, sisters of Ismail, will be entitled to the succession as daughters of the original donee Ahmad Din. In support of this proposition the learned counsel for the appellants cites *P. R.* 84 of 1909 (1).

His second contention is that plaintiff consented to the mutation, now disputed, at the time when it was sanctioned and he is now estopped from questioning it.

The third point urged on behalf of the appellants is that even if the parties are bound by custom rather than by personal law, the plaintiff's father consented to the terms of the mutation and still approves of them, and that his *bona fide* consent binds his son. In this connection a reference is made to *P. R.* 68 of 1912 (2), 78 of 1903 (3), 59 of 1904 (4), 7 of 1905 (5), 35 of 1907 (6) and 37 of 1907 (7).

Finally it is contended that as a matter of fact the family of the parties in the past has observed Muhammadan Law, that mutation has not been made in the past in favour of female sharers solely from disinclination to bring their names upon a public record but as a fact they have been paid regularly their share of the produce to which their shares under Muhammadan Law entitled them.

The learned Divisional Judge has considered in detail the mutations occurring in the family since the death of Ahmad Din and has shown that on no one occasion is there any trace that the succession took place according to Muhammadan Law. We too have considered all those mutations and we find ourselves in complete agreement with the conclusion of the learned Divisional Judge that as a fact the family in the past has observed not personal law but a custom which appears

(1) 84 *P. R.* 1909 (*Gurdit Singh v. Mussammat Prem Kaur*).

(2) 68 *P. R.* 1912 (*Habib Khan v. Muhammad*).

(3) 78 *P. R.* 1903 (*Shib Ram v. Shib Singh*).

(4) 59 *P. R.* 1904 (*Kaman v. Muhammad Ali*).

(5) 7 *P. R.* 1905 (*Labhu v. Mussammat Nihali*).

(6) 35 *P. R.* 1907 (*Lakha Singh v. Jota Singh*).

(7) 37 *P. R.* 1907 (*Devi Dial v. Utam Devi*).

to us to be undistinguishable from agricultural custom. It appears from the patwari's evidence that the parties are Bhatti Rajputs who about the year 1835 left their ancestral home in Pind Dadan Khan *Tahsil* and settled in this village of Kum in Ludhiana. Ala-ud-Din and Sharaf-ud-Din were the two individuals who were responsible for this migration. Ala-ud-Din acquired this land by virtue of his religious lore, and from a *Robkar* of the Deputy Commissioner, dated 1848, it appears that on the death of Ala-ud-Din one-fifth of his property was given to Ahmad Din, who was a nephew of Ala-ud-Din and also the husband of Mussammat Aisha, daughter of Ala-ud-Din. Had the parties at that time observed the principles of Muhammadan Law the gift or the bequest to Ahmad Din of one-fifth of the estate of Ala-ud-Din would have contravened those principles.

In support of his contention that gifted property returned to the donor's family only on the disappearance of the whole family of the original donee the learned counsel for the appellants has quoted *P. R.* 84 of 1909, (1) but it seems to us that the head note of that decision is wider than is justified by the actual finding in the case. In that case all that was decided was that the daughter of the last holder of the donated property was an heir of the last holder and that her right was a bar to the reversion of the gifted property to the family of the donor. In this case the sisters of the last holder Ismail are, it is true, the daughters of Ahmad Din, the original donee, but in the present case they cannot be regarded in their character of daughters of the original donee. They must be considered solely as the sisters of Ismail, the last male holder, and it is very doubtful whether sisters are ever heirs under agricultural custom. In view, however, of our finding that the family of the parties has in the past observed custom and not Muhammadan Law, this point is not of great importance.

On the point whether the plaintiff consented to the mutation in dispute we find that the evidence is very meagre and at the same time not very conclusive or clear. The plaintiff's own father alleges that at the time of mutation plaintiff assented to it and he proceeds to say that plaintiff was present but he corrects himself and states he is not sure; but it is not clear whether he meant to say that he was not sure that plaintiff was present or that he was not sure whether plaintiff consented. The witness, moreover, is not very disinterested because he is a defendant and is desirous of establishing Muhammadan Law in his family in regard to future cases of

(1) 84 *P. R.* 1909 (*Gurdit Singh v. Mussammat Prem Kaur*).

succession, although in the past custom has been followed. We do not find it proved that plaintiff gave his assent to the mutation in dispute.

There remains the argument that if the parties follow custom the assent of the father binds the son.

The decision in these cases turns on the *bona fides* of the father. If the father's assent has been given, as in this case, not because the parties in the past have observed Muhammadan Law but because the father wishes to follow it in the future, his assent cannot be called a *bona fide* assent and he cannot by accepting a rule for himself, render that rule binding upon the other members of his family.

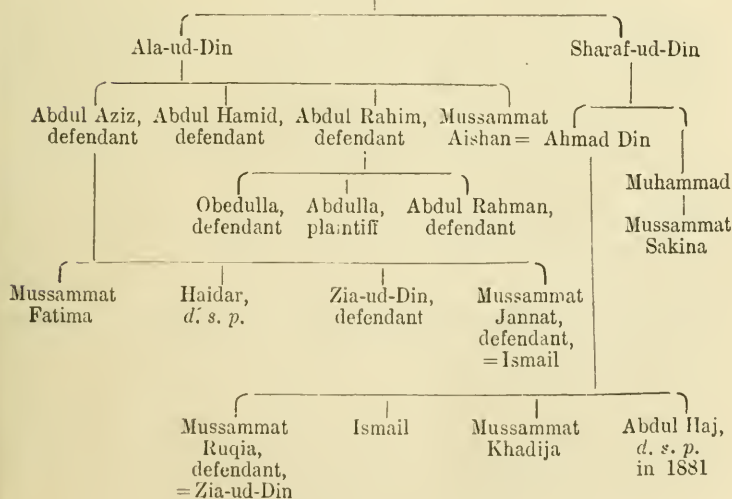
Our finding then is that in the past the family has observed custom not personal law and that the mutation now in dispute does not affect the rights of plaintiff as a reversioner. There is a cross-objection as to costs, which we dismiss and we dismiss this appeal leaving parties to pay their own costs throughout.

Appeal dismissed.

Pedigree-table appended to the judgment in Civil Appeal

No. 619 of 1910.

ROSHAN DIN



No. 5.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shadi Lal.

MOTA SINGH—(PLAINTIFF)—APPELLANT,
Versus
 BISHEN SINGH AND OTHERS—(DEFENDANTS)—
 RESPONDENTS.

Civil Appeal No. 1150 of 1911.

Mortgage—interest after due date—whether chargeable in absence of express agreement.

Held, that in the absence of a covenant that interest should cease to run after expiry of the stipulated period, the creditor should ordinarily be allowed interest at the rate specified in the deed for the entire period during which the mortgage remains unpaid.

77 P. R. 1898 (1), followed.

114 P. R. 1901 (2), distinguished.

I. L. R. 20 All. 171 (P. C.) (3), and I. L. R. 19 All. 39 (49) (P. C.) (4), referred to.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Ferozepore Division, dated the 7th July 1911.

Sangam Lal, for Appellant.

Rambhaj Datta, for Respondents

The Judgment of the Court was delivered by—

23rd June 1915.

SHADI LAL, J.—The dispute in this appeal relates to the liability of the mortgagor's representative to pay interest on two mortgage-deeds dated 2nd of October 1895 and 29th June 1896, respectively. The rate of interest stipulated in each deed is 15 per cent. per annum and the periods fixed for redemption are seven years and five years, respectively. The plaintiff contends that he is not liable to pay interest after the expiry of the stipulated periods while the mortgagee claims interest for the entire period during which the debt has remained unliquidated. The learned Divisional Judge has allowed interest at the agreed rate up to the date of the suit and at 6 per cent. per annum from that date till the date of redemption.

The plaintiff has preferred a further appeal against that decision, and after hearing arguments on both sides we are of

(1) 77 P. R. 1898 (*Sardar Umrao Singh v. Sardar Thakar Singh*).

(2) 114 P. R. 1901 (*Mohan Lal v. Mukim*).

(3) (1897) I. L. R. 20 All. 171 (P. C.) (*Bindesri Naik v. Ganga Saran*).

(4) (1896) I. L. R. 19 All. 39 (49) (P. C.) (*Mathura Das v. Raja Narindar Bahadur*).

opinion that there is no sufficient ground for interference with the judgment of the lower Appellate Court and that this appeal must be dismissed.

A perusal of the deeds shows that the stipulations fixing the periods for redemption were entered into in the interest of the mortgagee and that, to use the language of their Lordships of the Privy Council in *I. L. R. 20 All. 171* (1), "it was not intended that the capital sums should cease to bear interest upon the arrival of the time stipulated for their payment." There is absolutely no reason why the mortgagor should continue to use the money of the mortgagee without incurring liability for the payment of interest and the reasonable inference to be deduced from all the terms of the deeds is that the parties intended that the covenant as to interest should remain in full force up to the date of redemption. Any other interpretation is open to the objection which is so forcibly pointed out in the following observations of their Lordships of the Privy Council in *I. L. R. 19 All. 39*, at p. 49 (2):—

"The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a Jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction."

The judgment in 114 *P. R.* 1901 (3), relied upon by the appellant, proceeds upon the particular facts of that case, and we do not think it lays down any rule of general application. On the other hand, a Division Bench of this Court in 77 *P. R.* 1898 (3) decided that, in the absence of a covenant that interest should cease to run after the expiry of the stipulated period, the creditor is entitled to interest at the rate specified in the deed for the entire period during which the mortgage

(1) 1897, *I. L. R. 20 All. 171* (P. C.) (*Bindesri Naik v. Ganga Saran*).

(2) 1896, *I. L. R. 19 All. 39* (49) (P. C.) (*Mathura Das v. Raja Narindar Bahadur*).

(3) 114 *P. R.* 1901 (*Mohan Lal v. Mukim*).

(4) 77 *P. R.* 1898 (*Sardar Umrao Singh v. Sardar Thakar Singh*).

money remains unpaid. This judgment is in accordance with the exposition of law contained in *I. L. R. 19 All. 39 P. C. (1)*, and the principle thereof is fully applicable to the present case.

Upon a consideration of the terms of the deeds and the law bearing upon the subject we hold that the view taken by the learned Divisional Judge is correct. We accordingly confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

Privy Council.

No. 6

PRESENT :—

VISCOUNT HALDANE.

LORD SHAW.

SIR GEORGE FARWELL.

SIR JOHN EDGE.

MR. AMEER ALI.

BAGGA AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

SALEH AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Privy Council Appeal No. 75 of 1912.

(Chief Court Civil Appeal No. 120 of 1905).

Village common land—non-proprietors paying tirni—whether entitled to share in it.

Held, that the payment of *tirni* by a person who is not a proprietor paying land revenue, does not confer upon him any right to participate in the partition of the *shamilat*.

Appeal from the decree of the Chief Court of the Punjab (Chatterjee and Johnstone, JJ.) dated 20th June 1907.

A. Grey, for Appellants.

Nemo, for Respondents.

The Judgment of their Lordships was delivered by—

SIR JOHN EDGE— This is an appeal by the plaintiffs in the suit from a decree of the Chief Court of the Punjab, which had dismissed their appeal from a decree of the trial judge by which their suit had been dismissed. The respondents to this appeal have not appeared.

In their plaint, dated the 3rd May 1905, the plaintiffs alleged that they, "like the landowners, are the proprietors" of houses and vacant sites in *Patti Lak* and had paid *tirni* (grazing dues) in respect of village *shamilat* land (common land) of *Lak* and

(1) (1896) *I. L. R. 19 All. 39 (P. C.) (Mathura Das v. Raja Narindar Bahadur)*.

they claimed a declaration that they, ' like proprietors, may be " declared co-sharers in 30,838 *bighas* $1\frac{3}{4}$ *kanals* of the village " *shamilat* land of *Patti Lak* in proportion to Rs. 29-15-7, the " *tirni* paid by the plaintiffs, and a share (may be) awarded " to them in the said village *shamilat* of *Patti Lak* on the " said *tirni* amount according to the *Khewat*."

It is to be observed that in their plaint the plaintiffs did not base their claim to share on the partition of the common lands of *Patti Lak* upon any right as proprietors of any lands assessed to the revenue in *Patti Lak*. The plaintiffs were not recorded in the *Khewat* as persons paying land revenue in respect of land held by them in *Patti Lak*. They did not, in fact, hold any lands in *Patti Lak* which were assessed to the land revenue. What they claimed was that as they had paid grazing dues they should be treated in the partition of the common land of the village as if they were proprietors of the village, holding lands which had been assessed to the revenue. The trial judge rightly held that the plaintiffs had not proved any right to participate in the partition of the common lands and dismissed their claim. On appeal the Chief Court held that the payment of *tirni* by a person who was not a proprietor paying land revenue did not confer upon him any right to share in the *shamilat* of *Patti Lak*. The plaintiffs have failed to prove that they have any right to participate in the partition of the *shamilat* of *Patti Lak*.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Messrs. T. L. Wilson and Co, Solicitors for the Appellants.

No. 7.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice Leslie Jones.

CHHUTTAN AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

HAZARI LAL AND OTHERS—(DEFENDANTS)—

RESPONDENTS.

Civil Appeal No. 2374 of 1913.

Custom—succession—self-acquired property—Gaur Brahmins, tahsil Palwal, district Gurgaon—collaterals in third degree or daughter and her sons—Riwaj-i-am—weight of entry in—when opposed to general custom.

Held, that the plaintiffs had failed to prove that by custom governing the Gaur Brahmins of the Palwal *tahsil*, district Gurgaon, they, as collaterals in the third degree, had a preferential right of succession to a daughter and her sons in respect of self-acquired property.

Held also, that entries in a *Riwaj-i-am* when opposed to the general custom, can carry very little weight unless supported by instances.

First appeal from the decree of Lala Topan Ram, District Judge, Gurgaon, dated the 15th September 1913.

Sangam Lal, for Appellants.

Kirkpatrick, for Respondents.

The Judgment of the Court was delivered by—

26th June 1915.

CHEVIS, J.—The plaintiffs are collaterals in the third degree of Gokal, and claim to succeed to his property to the exclusion of Gokal's daughter and her sons. The parties are Gaur Brahmins of the Palwal *Tahsil* of the Gurgaon District. Gokal died, so it appears, about 1885, and the estate was then held by his widow Mussammatt Ram Devi, on whose death in 1912, the present dispute between the plaintiffs and the daughter of Gokal arose. The daughter died during the pendency of the suit, and her sons are now defendants in her stead. The lower Court finds that the parties are governed by custom, that the property is not ancestral *qua* the plaintiffs, and that no special custom is proved by which collaterals can exclude a daughter and her sons from self-acquired property. So the lower Court has dismissed the suit. The plaintiffs appeal.

Though Mr. Kirkpatrick does not admit that the parties are governed by custom it may be assumed that they are.

The first two grounds of appeal attack the finding of the lower Court as to the property not being ancestral *qua* the plaintiffs. Counsel for the plaintiffs has not thought fit to say a word in support of these grounds, and we need only say briefly that the lower Court's decision on this point seems perfectly correct.

Grounds 5 and 6 complain of proceedings having taken place in September to the prejudice of the plaintiffs, but here again counsel has not thought it worth his while to address us, so we take it that there has been no real prejudice.

Mr. Sangam Lal's arguments are—

(1) that by general custom of the Province collaterals exclude a daughter even as regards self-acquired immoveable property ;

(2) that in this particular case plaintiffs have proved that by custom of Gurgaon Brahmins a collateral excludes a daughter from all kinds of immoveable property.

As to what the general custom is we consider it well established that as regards self-acquired property, *i. e.*, property

which has not descended from the common ancestor, a daughter or her sons succeeds in preference to the collaterals. There is ample authority for this. The authorities are to be found in Rattigan's Digest and we need not cite them here.

So the plaintiffs, in order to succeed, must prove a special custom. No doubt the *Rivaj-i-am* (see page 7 of the paper-book) prepared in 1879, is in favour of the plaintiffs, but no instances are there quoted. We do not say that statements in a *Rivaj-i-am* can never carry any weight unless supported by instances, but we certainly do consider that such statements, when opposed to the general custom, can carry very little weight unless supported by instances. Certain instances have been cited by the plaintiffs' witnesses, but on examination they are of no value. The instances are as follows :—

(1) *Kallu* was succeeded by his brother to the exclusion of his daughter, see evidence of Babu, witness P. 1. But the property was in part at least ancestral according to this witness, and according to Nathan Singh, P. W. 5, it was wholly so.

(2) *Bhura* was succeeded by his collaterals. This case is cited by Babu, P. W. 1, and apparently by Nathan, P. W. 5. Neither witness mentions the existence of a daughter, and Nathan says the land was ancestral.

(3) *Nauba* was not succeeded by his daughter. Here again the land was ancestral, see evidence of P. W. 5, Nathan.

(4) *Devi Ram* left a son and a daughter. Of course the son succeeded, excluding his sister. This is not a case of exclusion by a collateral.

(5) *Baldeo* was succeeded by his nephew to the exclusion of his daughters, see evidence of Madho, P. W. 2, who says the property was partly ancestral and partly self-acquired.

(6) *Todha's* daughter was excluded by collaterals. But the land was ancestral, see evidence of Chhajan, P. W. 4.

(7) *Ganeshi's* property went to his collaterals on his widow's death. See evidence of Shib Lal, P. W. 6, who says Ganeshi's sister's sons were excluded. Of course a sister or her son cannot ordinarily succeed.

(8) *Sandhi's* widow made a gift to her daughter's sons, which the collaterals got upset. But the land was ancestral, see evidence of P. W. 6.

(9) *Mussammat Dhan Kaur's* case is cited by P. W. 6, who says *Mussammat Dhan Kaur* herself acquired land which went to her husband's brother, and not to her daughter's son

whom she tried in vain to adopt—so Shib Lal, P. W. 6, deposes. We can only say that if the version given by him is correct the daughter's son was apparently foolish not to assert his rights to his grandmother's self-acquired property.

(10) *Ji Sukh's* daughter was excluded by a collateral. This case is cited by Nathan Singh, P. W. 5, who says the land was partly ancestral.

It will be seen that these instances can carry very little if any weight. If in certain cases the estate comprised a little self-acquired land it is no wonder if the daughter did not trouble to contest the claim of the collateral.

But counsel urges that some of defendants' witnesses also support the alleged custom. Shiv Sahai (p. 27) says he has some acquired property which will go to his nephew if he does not make a gift in his daughter's favour. Apparently he thinks the self acquired property must go with the rest of the estate, but it does not at all follow that his opinion is correct. Ram Narain D W. 1 (pages 26—27) cites three instances in which a daughter succeeded by gift, and counsel relies on this as showing that but for the gift the daughter would not have succeeded. But even though a daughter may be the heir there is nothing strange in her father making a gift in his life-time. The object of such a gift is to accelerate the succession, not to divert it. We agree with the lower Court that plaintiffs have failed to prove their right to exclude the daughter's sons.

In conclusion we note that counsel wished to argue a point not raised in his memorandum of appeal, *viz.*, that Sukh Ram, nephew of Gokal, who died in 1902, was the last male owner. This argument was put in as an additional ground of appeal long after the period of limitation for appealing had expired and as it entirely varies the grounds on which plaintiffs claim possession of the property we declined to hear counsel in support of this ground. We merely note that if Sukh Ram ever succeeded to the property it is remarkable that plaintiffs did not claim the estate on his death, also that in the presence of Gokal's widow Sukh Ram's succession would be entirely opposed to custom, and that according to the plaint it was not Sukh Ram who succeeded on Gokal's death, but Gokal's widow who succeeded on the usual life tenure and died eight months prior to institution of suit.

We uphold the decree of the lower Court dismissing the suit, and dismiss the appeal with costs.

Appeal dismissed.

No. 8.

*Before Hon. Mr. Justice Chevis and Hon. Mr.**Justice LeRossignol.*

MOTI SINGH AND OTHERS—(DEFENDANTS)—

APPELLANTS,

Versus

MUSSAMMAT JAMNA DEVI—(PLAINTIFF)—

AND MEHR SINGH—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 968 of 1913.

Custom—succession—widow's estate—Khatri Jagirdars of the Attock District—Hindu Law—widow's status to challenge alienations made by her husband—instrument declaring that widow is only to receive maintenance—necessity of registration—Indian Registration Act, XVI of 1908, section 17.

Held, that both under Hindu law and agricultural custom a widow is entitled to a life interest in her husband's estate and no special family custom had been proved among these Khatri Jagirdars entitling her to maintenance only.

Held also, that a widow is not competent to challenge any disposition of property made by her husband.

135 P. R. 1908 (1) and 17 P. R. 1913 (2), referred to.

But held, that the document relied on in this case, made by the widow's husband and his brothers, which declared the right and interest of the brothers in estates of large value and also stated in one clause that their widows should not inherit a life estate but receive maintenance only of Rs. 25 per mensem, was not receivable in evidence as it had not been registered, and could not therefore affect the widow's right to a life interest.

First appeal from the decree of G. H. Harris, Esquire, Subordinate Judge, 1st class, Rawalpindi, dated the 30th April 1913.

Muhammad Shafi, for Appellants.

Beechey and Kharak Singh, for Respondents.

The Judgment of the Court was delivered by —

LEROSSIGNOL, J.—The plaintiff, who is the widow of one 17th July 1915. of the sons of Gurdit Singh, sued the surviving brothers and the nephew of her late husband for possession of her husband's share in certain villages.

The defence to the suit was that by a custom of the family the plaintiff was entitled solely to maintenance, further, that the plaintiff was bound by an agreement subscribed to by all the brothers in 1884. Mehr Singh, the senior brother, before the Court below compromised the case with the plaintiff, by receiving from her a certain area in recognition of his right of Sardari or headship of the family and conceding to her the balance of her late husband's share.

(1) 135 P. R. 1908 (*Maqsood-ul-Nisa v. Kaniz Zohra*).

(2) 17 P. R. 1913 (*Mussammat Mehtab Bibi v. Mussammat Hussain Bibi*).

This compromise was followed by a decree which was *ex parte* against the defendants other than defendant 1, but on the application of the remaining defendants, that decree was subsequently set aside and the whole question re-opened.

The lower Court has found for the plaintiff on the ground that the alleged family custom has not been established and that the agreement of 1884 required registration and not having been registered was inadmissible as evidence.

From the Subordinate Judge's decree, Mehr Singh appeals to this Court and prays that the compromise be maintained so far as he is concerned.

The remaining male defendants in a separate appeal challenge the decree on the grounds that the family custom has been established and that the agreement of 1884 has been acted upon, is admissible, and is binding on the plaintiff, who is not competent to challenge her husband's disposition of his property. The parties belong to a family of Jagirdars and though they own land they are not agriculturists in the strict sense of the term. They are of the Khatri tribe.

Both under Hindu Law and under agricultural custom, a widow is entitled to a life interest in her husband's estate, so that the proof of establishing a special custom to the contrary was rightly laid on the defendants.

On the question of special custom, we may say at once that we find the defendants have failed to establish it.

In the family two cases are cited, that of Mussammatt Bishen Devi, widow of S. Jiwan Singh, but this instance is beside the point, for her husband Jiwan Singh left a son Gurdit Singh. On the death of S. Narinjan Singh in 1889 his widow received only maintenance, but only after there had been a dispute which was settled by arbitration.

A few instances are quoted from other families, but these cannot be regarded as going to establish a special custom in the parties' family.

A special custom directly opposed to the personal law of the parties requires much stronger evidence than is here produced before it can be declared to exist and although one of the plaintiff's witnesses, P. W. 2, says that the ladies of this family never receive a share of the land, he is a Muhammadan tenant only and not in a position to have any intimate knowledge of the subject, in fact the oral evidence on both sides is of no value.

Although it is admitted by Mussammat Har Kaur, widow of Niranjani Singh, that she got only *maintenance* on her husband's death, we nevertheless find her recorded as a sharer in Dadhambar (page 29 of paper book) and in Wazirabad (page 17 of ditto).

The next point is the admissibility of the agreement of 1884 and its binding effect on Mussammat Jamna Devi.

If the document is admissible, it would appear to bind Mussammat Jamna Devi, for a widow is not competent to challenge any disposition of property by her husband, *cf.* 135 P. R. 1908 (1), 17 P. R. 1913 (2).

The appellants contend that the instrument as a whole does not require registration, but that whether it does or not, clause VI of the instrument is complete in itself, that it is separable from the rest of the document and that it deals with the rights of the widows of the family.

It is further contended that it is of a testamentary character. We are unable to accept these contentions. The clause VI is not of a testamentary character inasmuch as it is not unilateral and is not revocable. Once the brothers had subscribed to it, each one was bound by it and one was not competent to renege from it without the assent of the others. It is in fact an agreement *inter vivos*.

The clause constitutes an agreement between all the brothers whereby they declare that their widows shall not inherit a life estate but shall receive only a maintenance allowance of Rs. 25 per mensem.

Even in the case of Mussammat Har Kaur, as we have noted above, this rule was not followed for she was mutated a full sixth share = 865 in Dadhambar.

Similarly the rest of the instrument declares the right and interest of the brothers in estates of large value.

We hold that the instrument is not admissible in evidence for the reason that it is not registered, and its registration was compulsory, before it could be effective.

The result is that this appeal fails and is dismissed.

As for Mehr Singh's appeal, his only contention is that his compromise with plaintiff should be maintained.

The Subordinate Judge refused to maintain it on the ground that when the case was reopened, he hotly contested plaintiff's

(1) 135 P. R. 1908 (*Maqsood-ul-Nisa v. Kaniz Zohra*).

(2) 17 P. R. 1913 (*Mussammat Mehtab Bibi v. Mussammat Hussain Bibi*).

claim. This is scarcely correct, in his pleas he relied on the compromise and he appeared as a witness for the defendants only after a bailable warrant had issued for his attendance.

He then denied the plaintiff's right to a share, but admitted that his grandmother's case was the only instance he could cite.

We see no good reason for setting aside the compromise between plaintiff and Mehr Singh which they reached between them without reference to the other defendants.

We accordingly accept Mehr Singh's appeal and decree for the plaintiff by modifying the lower Court's decree, so as to bring it into harmony with the compromise aforementioned but we allow Mehr Singh no costs. The plaintiff's costs throughout shall be paid by the remaining defendants.

Appeal dismissed.

No. 9.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Shah Din.*

JAGAT RAM—(PLAINTIFF)—APPELLANT,

Versus

MEHR DIN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1153 of 1913.

Punjab Pre-emption Act, II of 1905, section 11 proviso—meaning of "recorded" (as an owner, &c.)

Held, that the word "recorded" in the proviso to section 11 of the Pre-emption Act, means "entered in the record of rights" and a person cannot be properly said to be so entered, if only his name has been entered in the register of mutations by the patwari and a report put up in his favour in the appropriate column of that register.

17 P. R. 1915, p. 95 (1), distinguished.

Second appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore Division, dated the 3rd May 1913.

Dalip Singh and Bahadur Chand, for Appellant.

Muhammad Shafi, Dhanpat Rai, Durga Das and Balwant Rai, for Respondents.

The Judgment of the Court was delivered by—

22nd July 1915.

SHAH DIN, J.—The suit which has given rise to this second appeal was brought by the plaintiff-appellant, Jagat Ram, against the defendants-respondents Mehr Din, Hussain Bakhsh and Puran Chand for possession, by pre-emption, of 43 *kanals* 19 *marlas* of land situate in village Jia Musa, *tahsil* Lahore, which

(1) 17 P. R. 1915 (p. 95) (*Ilari Ram v. Allah Ditta*).

had been sold by a registered deed, dated the 21st February 1911, by Puran Chand to Mehr Din and Hussain Bakhsh for Rs. 5,600. The plaintiff, who is a brother of Puran Chand, vendor, is by caste a Khatri and is admittedly not a member of an agricultural tribe. He claims to have a right of pre-emption in respect of the land sold by his brother to the above-mentioned vendees under the *proviso* to section 11 of the old Punjab Pre-emption Act, II of 1905. Both the Courts below have dismissed the suit on the ground that at the date of sale the plaintiff was not recorded as the owner of agricultural land in village Jia Musa, and that he is not therefore entitled to the benefit of the *proviso* to section 11 aforesaid.

The sole question for decision in this second appeal is whether or not the lower Courts are right in holding that the plaintiff was not recorded as owner of agricultural land in the village at the date of sale within the meaning of section 11 of the Pre-emption Act, II of 1905. The material facts bearing upon this question are these. It seems that prior to 1910 the plaintiff was not recorded as an owner of agricultural land in village Jia Musa; but on the 14th February 1910 the patwari entered a report in the register of mutations proposing that a certain area of land should be mutated in the plaintiff's name. The facts relating to the proposed mutation have not been stated by the Courts below and it is unnecessary to set them out in this place. The mutation was not sanctioned by the Revenue Officer until the 15th June 1911, but meanwhile, on the 21st February 1911, the land in dispute was sold by the plaintiff's brother Puran Chand in favour of the present vendees Mehar Din and Hussain Bakhsh.

The plaintiff's learned counsel has argued that since on the 14th February 1910 the patwari had put up the mutation in favour of the plaintiff in the register of mutations, the plaintiff was on that date "recorded" as the owner of agricultural land in village Jia Musa within the meaning of the *proviso* to section 11 of the Pre-emption Act of 1905, and that he was therefore entitled to a right of pre-emption in respect of the sale in dispute which took place on the 21st February 1911.

In support of this contention the learned counsel has relied on the recent decision of this Court in No. 17 P. R. 1915 (at p. 95) (1). That decision, however, is not in point. There the question was whether the father of the plaintiff (who was an Arora by caste and therefore not a member of an agricultural tribe) had been recorded as an owner of agricultural land

(1) 17 P. R. 1915 (p. 95) (*Hari Ram v. Allah Ditta*).

in the estate in which the property sold was situate for twenty years previous to the date of sale. It was found that mutation in respect of a plot of land in the village had been attested in his favour on the 9th September 1889 more than twenty years prior to the date of sale, and since the *Jamabandis* of 1889-90 had been destroyed it was presumed under section 114 of the Evidence Act that proper entries in pursuance of the mutation order must have been made in the *Jamabandi* papers. The remark made by the learned Judges in that case to the effect that "a mutation register is certainly a record "within the meaning of the proviso" to section 11 of the Pre-emption Act must be read in the light of the contest and in relation to the facts of the case before the Court, and when so read it in no way helps the plaintiff in the present case.

Admittedly, no mutation had taken place in favour of the present plaintiff before the sale in dispute, and we are quite clear that the mere fact that the patwari entered a report in the mutation register in favour of the plaintiff on the 14th February 1910 is wholly insufficient to justify a finding that the plaintiff was "recorded" as the owner of agricultural land at the date of sale. It is well known that when a patwari makes an entry in his register of mutations under the provisions of sub-section (3) of section 34 of the Punjab Land Revenue Act he does so either in pursuance of a report made to him under sub-section (1) of the said section or of his own motion under certain circumstances. After the entry has been made by the patwari its correctness is enquired into by a competent Revenue Officer who makes such order as he thinks fit with respect to the entry in the annual record of the right acquired and to which the patwari's report relates. After the Revenue Officer has made an order under sub-section 4 of section 34 aforesaid an entry is made in the annual record under the provisions of sub-section (5) thereof; and it is obvious that until at least mutation has been properly attested by competent authority the person in whose favour the patwari has put up the mutation in the register of mutations cannot be said to be "recorded" as the owner of land in the estate to which the register relates.

In our opinion the word "recorded" in the *proviso* to section 11 of the Pre-emption Act means entered in the record of rights, and nothing is clearer than that a person cannot be properly said to be entered in the record of rights as the owner of land if only his name has been entered in the

register of mutations by the patwari and a report has been put up in his favour in the appropriate column of that register.

For these reasons we agree with the lower Courts that the plaintiff was not recorded as the owner of agricultural land in village Jia Musa at the date of the sale in dispute; and that being the case, it is clear that he had no right of pre-emption in respect of the land in suit under the *proviso* to section 11 of the Pre-emption Act, II of 1905. We accordingly maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

No. 10.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Shah Din.*

MUSSAMMAT RUKMAN DEVI—(PLAINTIFF)—
APPELLANT,

Versus

MUSSAMMAT SHIB DEVI AND OTHERS—(DEFENDANTS)
—RESPONDENTS.

Civil Appeal No. 2005 of 1912.

*Civil Procedure Code, Act V of 1908, Order 1, rule 1—legality of suit by
different sets of plaintiffs claiming in the alternative.*

The parties were Aroras of Sialkot. The suit was by two sets of plaintiffs, *viz.* (1) the brother's sons and (2) the daughters, of one L. S., deceased, against the defendant, the widow of a grandson of L. S. The plaintiffs claimed that either the nephews or the daughters are the legal heirs of L. S. and that they have by agreement arranged to divide the property in the event of either set of plaintiffs succeeding in the suit.

Held that, having regard to the provisions of Order 1, rule 1, of the Code of Civil Procedure which contemplate, even if they do not actually encourage, claims by different plaintiffs in the alternative, provided there is a common question of law or of fact which would arise if such plaintiffs brought separate suits, the suit should not have been dismissed on the ground that the plaint contained contradictory allegations and made inconsistent claims.

*Second appeal from the decree of H. A. Rose, Esquire, Divisional
Judge, Sialkot, dated the 10th August 1912.*

Nand Lal, for Appellant.

Duni Chand, for Respondents.

The Judgment of the Court was delivered by—

RATTIGAN, J.—The Divisional Judge has devoted a considerable part of his judgment to criticising adversely the action of the plaintiffs in presenting a joint plaint in this case, and has indeed dismissed their suit on the ground that the plaint

22nd July 1915.

contains contradictory allegations and makes inconsistent claims. It appears to us that the learned Judge has overlooked the provisions of Order 1, Rule 1, Civil Procedure Code, which contemplate, even if they do not actually encourage, claims by different plaintiffs in the alternative, provided that there is a common question of law or of fact which would arise if such plaintiffs brought separate suits. The parties are as follows:—(1) one set of plaintiffs comprises the nephews (brother's sons) of Lachhman Shah, deceased; (2) the second set of plaintiffs are the daughters of the said Lachhman Shah; (3) the defendant Mussammatt Shih Devi is the widow of Nand Lal, the grandson of Lachhman Shah. Both Nand Lal and his father Narain Das predeceased Lachhman Shah. The parties are Aroras of Sialkot and are said ordinarily to reside in that city. The suit relates to the properties of Lachhman Shah, and the plaintiffs claim that either the nephews or the daughters are the legal heirs of the deceased and they set out that they have by agreement among themselves arranged to divide the property in the event of either set of plaintiffs succeeding in the suit. It is urged on their behalf that if Hindu Law applies the daughters are undoubtedly Lachhman Shah's heirs, and that if custom is to be applied, then under the ordinary rule as laid down in paragraph 9 of the Digest of Customary Law the widow of a grandson who predeceased his grandfather would have no claim to succeed as heir in the presence of the nephews of the deceased.

In our opinion the probabilities are that the family is governed by Hindu Law. The members of it are Aroras and, so far as we can see, have little or no connection with agriculture. Such being the case the daughter would admittedly succeed in preference to the defendant. Assuming, however, that custom obtains among the parties, the burden of proving a special custom such as that which was held to have been established in No. 30 *P. R.* 1909 (1), among Ranhawa Jats of Amritsar, would rest upon the defendant. She had ample opportunity of proving the existence of any such special custom but was unable to discharge the *onus* resting upon her. From whatever point of view, therefore, that we look at the case, it is clear that one or other of the plaintiffs must succeed, and we cannot agree with the Divisional Judge that their plaint contained such contradictory allegations as to justify the dismissal of the suit.

The Divisional Judge has found as a fact, and this finding is binding on us on second appeal, that Narain Das was not joint with Lachhman Shah. As a result of this finding we must hold that such part of the property in suit as belonged to Narain Das must be excluded from the decree to be given to the plaintiffs. Counsel on both sides agree that Narain Das' property consists of (1) a plot of 7 *kanals* 11 *marlas* of land situate in Mahal Rangpur, and (2) one house situate in Sialkot town. These two properties must accordingly be excluded from the decree, but in all other respects the decree in plaintiffs' favour will be as given by the District Judge. The appeal is accepted, but we direct that the parties bear their own costs throughout.

Appeal accepted.

No 11.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Le Rossignol.

THARU MAL AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

CHANDU RAM AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1312 of 1914.

Court-fees—ad valorem—on appeal, where appellant objects that the decretal amount should not have been made realisable from certain properties.

Plaintiff obtained a money decree against defendant realisable from certain properties in defendant's possession. This decree was upheld on appeal by the Divisional Judge. Defendant preferred a second appeal to the Chief Court on a Rs. 10 stamp on the ground *inter alia* that the Courts below should only have passed a money decree.

Held, that the appeal must bear a Court-fee stamp *ad valorem* to the amount of the decree.

I. L. R. 10 Mad. 187 (1) and I. L. R. 30 Mad. 96 (2), referred to.

Second appeal from the decree of F. B. R. Spencer, Esquire, Additional Divisional Judge, Multan, at Muzaffargarh, dated the 25th February 1914.

Nibal Chand, for Appellants.

Rama Nand and Har Gopal, for Respondents.

The Judgment of the Court was delivered by—

SHAH DIN, J.—The plaintiffs-respondents sued the defendants-appellants to recover Rs. 2,132-5 0 on *bahi* account and

(1) (1887) *I. L. R. 10 Mad. 187* (*Venkappa v. Narasimha*).

(2) (1906) *I. L. R. 30 Mad. 96* (*Ramakrishna Reddi v. Kotta Kota Reddi*).

claimed that this amount was recoverable from certain property specified in the plaint which the defendants had hypothecated to the plaintiffs to secure payment of the debt. The District Judge gave the plaintiffs a decree for the sum claimed which was to be realised from the property detailed in the plaint and from the other property in possession of the defendants. This decree was maintained on appeal by the Additional Divisional Judge.

A second appeal has been preferred to this Court by the defendants, and one of the points taken in the written memorandum of appeal is that the Courts below should have passed only a money decree against the appellants and should not have made the amount of the decree a charge on the property specified in the plaint. In respect of this relief the defendants have affixed a Court-fee stamp of Rs 10 to the memorandum of appeal.

On behalf of the respondents a preliminary objection is raised to the effect that since the appellants seek, among other reliefs, to have their property released from the liability to pay the decretal amount, Rs 2,132 5-0, their memorandum of appeal should, so far as this relief is concerned, bear an *ad valorem* Court-fee on the said amount of Rs. 2,132-5-0 and not merely a Court-fee stamp of Rs. 10 which is payable only in cases where a declaration without consequential relief is prayed for. In support of this contention *I. L. R. 10 Mad. 187 (1)* and *I. L. R. 30 Mad. 96 (2)* are cited by the respondent's pleader. These decisions seem to be in point, and the appellant's pleader is unable to distinguish them from the present case. Following these decisions, we hold that the appellants must pay on the memorandum of appeal an *ad valorem* Court-fee stamp on the sum of Rs. 2,132-5 0 which has been created a charge on the appellant's property by the decree of the Lower Appellate Court; and we direct that the deficiency in the Court-fee should be made good within one week.

On this order being announced the appellant's pleader informs us that his client, who is present in Court, is unable to pay the additional Court-fee required within the time allowed by us; and as we can see no sufficient grounds for giving the appellants more time for this purpose, we are constrained to dismiss the appeal on the ground that it is not properly stamped. The appeal accordingly fails and is dismissed with costs.

(1) (1887) *I. L. R. 10 Mad. 187 (Venkappa v. Narasimha).*

(2) (1906) *I. L. R. 30 Mad. 96 (Ramakrishna Reddi v. Kotta Kota Reddi).*

The respondents have filed certain cross-objections, but they are not pressed and we dismiss them.

Appeal dismissed.

No. 12.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice Shadi Lal.

MUSSAMMAT BASANTI—(DEFENDANT)—APPELLANT,

Versus

NATHA—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1718 of 1913.

Custom—alienation—adoption—status of daughter-in-law to challenge the adoption.

Held that under customary law a daughter-in-law of the adopter has no status to challenge the adoption.

63 P. R. 1912 (1), 94 P. R. 1913 (p. 343) (2), and 281 P. L. R. 1913 (3), referred to.

68 P. R. 1903 (remark at p. 294) (4), explained.

Second appeal from the decree of W. A. LeRossignol, Esquire, Divisional Judge, Ambala Division, dated the 12th July 1913.

Badr-ud-din and Balwant Rai, for Appellant.

Ganpat Rai and Gokal Chand Narang, for Respondent.

The Judgment of the Court was delivered by—

SHADI LAL, J.—The Courts below have concurred in *20th May 1915.* holding that the respondent, Natha, was adopted by Sujana and this finding being one of fact, cannot obviously be challenged in second appeal. The appellant's pleader, however, contends that Sujana was not entitled to adopt the respondent, and that the adoption is therefore invalid. Now the person challenging the adoption is the daughter-in-law of the adopter, and it is beyond dispute that if Sujana had made an alienation of the land, which is affected by the adoption, she would not have been entitled to attack it.

The proposition is absolutely clear that the customary appointment of heir—and the present adoption is one of that kind—is to all intents and purposes tantamount to a bequest, and we fail to understand why a person who cannot contest the power of testamentary disposition of a proprietor should be allowed to challenge the power of nominating an heir. This

(1) 63 P. R. 1912 (*Sant Singh v. Sudda*).

(2) 91 P. R. 1913 (p. 343) (*Ralia v. Wariam Singh*).

(3) 281 P. L. R. 1913 (*Surain Singh v. Jawahir Singh*).

(4) 68 P. R. 1903 (remark at p. 294) (*Bhupa v. Nigahia*).

principle is, in our opinion, a result of the legal incidents which attach to the institution of the appointment of heir and is recognized in a Division Bench judgment reported as 63 P. R. 1912 (1). To the same effect are the observations in 94 P. R. 1913 (at page 343) (2) and 281 P. L. R. 1913 (3). Mr. Balwant Rai places his reliance upon a chance remark contained in a Single Bench judgment in 68 P. R. 1903 at page 294 (4), but it is patent that the point was not before the learned Judge, and that he did not intend to lay down that the right to nominate an heir can be called into question by one who is precluded by custom from challenging the power of alienating the land which is to pass to the appointed heir.

We are, accordingly, of opinion that Mussammat Basanti cannot attack the adoption made by her father-in-law and direct that this appeal be dismissed with costs.

Appeal dismissed.

No. 13.

Before Hon. Mr. Justice Cheris and Hon. Mr. Justice Shadi Lal.

GHULAM JILANI KHAN—(PLAINTIFF)—APPELLANT,
Versus

IMDAD ALI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 983 of 1911.

Custom—succession—moveable property—self-acquired—brother or daughter—Rajputs of Garhshankar, Hoshiarpur District—moveable property acquired with income of ancestral property—Riwaj-i-am.

Held, that by custom moveable property acquired with the income of the ancestral property must be regarded as self-acquired property.

Held also, that by custom a daughter is ordinarily preferred to a collateral in succession to self-acquired "immoveable" property.

2 P. R. 1909 (5) and Rattigan's *Digest*, para. 23 (2), referred to.

Held further, that the *onus* of proving that by custom among Rajputs of Garhshankar, district Hoshiarpur, a brother succeeds in preference to a daughter to self-acquired "moveable" property, was upon the former and that he had failed to discharge the *onus*.

Para. 45 of the *Riwaj-i-am* of 1884, referred to and distinguished.

First appeal from the decree of Lala Kidar Nath, District Judge, Hoshiarpur, dated the 28th April 1911.

Ghulam Rasul, for Appellant.

Tek Chand, for Respondents.

(1) 63 P. R. 1912 (*Sant Singh v. Sadda*).

(2) 94 P. R. 1913 (p. 343) (*Kalia v. Wariam Singh*).

(3) 281 P. L. R. 1913 (*Surain Singh v. Jawahir Singh*).

(4) 68 P. R. 1903 (p. 294) (*Bhupa v. Nigahia*).

(5) 2 P. R. 1909 (*Nidhu v. Ram Singh*).

The Judgment of the Court was delivered by—

SHADI LAL, J.—The suit, which has led to this appeal, 21st May 1915. was instituted by one Ghulam Jilani Khan for the recovery of certain moveables and Government pro-notes on the allegation that the property belonged to his deceased brother Niamat Ali Khan and that on the death of the latter's widow the plaintiff was entitled by custom to inherit it. The claim was resisted by the son-in-law and the daughters of Niamat Ali Khan on various grounds, but it is unnecessary to deal with all the pleas raised by them because we are clearly of opinion that the suit must fail on the simple ground that the brother cannot succeed to the property in dispute in the presence of the daughters.

The deceased Niamat Ali Khan was a Rajput of Garhshankar in the Hoshiarpur District and there is no doubt that he was governed by the ordinary agricultural custom in matters of succession. Now it is manifest that the moveable property and the pro-notes, even if they were acquired with the income of the ancestral property, must be regarded as the self-acquired property of Niamat Ali Khan. This is an elementary proposition of the Customary Law and does not require authorities in support of it.

The question then arises whether among the Rajputs of Garhshankar, a brother has got the right to inherit the self-acquired moveable property to the exclusion of the daughters. In regard to self-acquired immoveable property it has been decided in several judgments of this Court that a daughter is ordinarily preferred to a collateral and the *onus* is on the latter to establish his right of succession (*vide, inter alia*, Rattigan's Digest of Customary Law, para. 23 (2), and 2 P. R. 1909) (1). And the *onus* obviously becomes very heavy when the dispute is with respect to succession to acquired moveable property. Now we are not aware of any decision, and certainly none has been cited before us, which in the matter of succession to property of the above description prefers a brother to a daughter. Upon the present record there is not a single document which supports the contention of the plaintiff and para. 45 of the *Rivaj-i-am* of 1884 which states that a daughter does not ordinarily succeed to her father's property has apparently no application to moveable property. It is however significant that in para. 41 in answer to the question whether there is any distinction between moveable and immoveable property in regard to the widow's power of alienation it is laid down in distinct terms that a widow can alienate moveable property.

(1) 2 P. R. 1909 (*Nidhu v. Ram Singh*).

If the widow can transfer moveable property to her daughter we cannot understand why the latter should not inherit it on her death.

The learned District Judge appointed a commissioner to make an enquiry into the custom and it appears that the plaintiff adduced some oral evidence to shew that daughters in certain instances did not get the property of their fathers. But as pointed out by the commissioner the property involved was in each case of a small value and the daughters did not therefore consider it worth their while to assert their rights against the reversioners. These instances have been examined at length by the learned District Judge and his conclusion is that they do not establish the custom set up by the plaintiff. It seems to us that a person, who rests his title upon a novel custom of this kind, must prove it by clear and cogent evidence and must satisfy the Court that the custom has been generally recognized and followed by the community. Evidence of this character the plaintiff has entirely failed to produce, and we are unable to sustain the unusual custom relied upon by him upon the unsatisfactory material upon the present case.

The learned counsel for the appellant finding that he was unable successfully to impeach the decision of the District Judge against his client has asked us to order a further enquiry into the custom. But we see no reason to accede to this request. It is to be observed that the case remained pending in the original Court for more than three years and that every opportunity was afforded to the plaintiff to substantiate his claim. We do not therefore think any useful purpose would be served by further prolonging this unnecessary litigation.

Accordingly we are unhesitatingly of opinion that the plaintiff on whom the *onus* lay has entirely failed to establish his right to the property in dispute and that his suit must be dismissed *in limine*. Upon this finding it becomes unnecessary to pronounce our decision on other matters in controversy between the parties, which would obviously be an *obiter dictum*. We therefore affirm the decree of the lower Court and dismiss the appeal with costs,

Appeal dismissed.

No. 14.

*Before Hon. Mr. Justice Chevis and Hon. Mr.**Justice Shadi Lal.*WISANDA MAL AND OTHERS—(PLAINTIFFS)—
APPELLANTS,*Versus*GANESHA MAL AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1771 of 1912.

Punjab Pre-emption Act, 11 of 1905, section 20—duty of Court to decide the issues suo motu.

Held, that it is the duty of the Court to investigate and decide the issues specified in section 20 of the Punjab Pre-emption Act, and the Court cannot be guided by the admissions of the parties, nor does their omission to adduce evidence on the point relieve the Court from the obligation created by the law.

First appeal from the decree of H. F. Forbes, Esquire, District Judge, Multan, dated the 8th July 1912.

Badr-ud-Din Kureshi and Bahadur Chand, for Appellants.
Broadway and Nand Lal, for Respondents.

The Order of the Court was delivered by—

SHADI LAL, J. — * * * * * Upon the 29th May 1915.
merits of the appeal we observe that the learned District Judge has not enquired into and determined the three issues which are specified by section 20 of the Pre-emption Act. The aforesaid section provides that the Court shall of its "own motion enquire into and decide the following issues "whether the facts involved therein be admitted or not." The language of the statute is explicit enough and there is no doubt that the Legislature has imposed upon the Court the duty of investigating and deciding those issues. The Court has to perform this duty *suo motu* and cannot in the discharge of its functions be guided by the admissions of the parties, and it is clear that their omission to adduce evidence necessary for the decision of the issues does not relieve it from the obligation created by the law. It has no doubt power to direct the parties to produce such oral and documentary evidence as it thinks fit, but if the material is insufficient for the proper decision of the issues, it must of itself take steps to place upon the record all the oral and documentary evidence essential to their right decision and then pronounce its findings thereon.

The learned District Judge has, in these suits, omitted to make such enquiry as is obligatory upon the Court, and

his judgment does not contain any finding on the aforesaid issues. To remedy this defect we are constrained to order a remand and we therefore consider it unnecessary to determine the question whether the appellants in Civil Appeal No 1771 of 1912 are entitled to produce the documentary evidence which was rejected by the Court of first instance. As observed already, the omission to adduce this evidence at the proper time was probably due to some inadvertence or mistake, and the Appellate Court has, in a case of that kind, ample power to allow additional evidence to be taken, more especially when it consists of documents, the genuineness of which cannot be impeached. It is unnecessary to deal at length with the matter, because the remand we are going to make will afford every reasonable opportunity for producing further evidence.

We remand under Order XLI, rule 25, both the appeals to the Court of the Senior Subordinate Judge, Multan, and direct him to enquire into and decide the three issues enumerated in section 20 of the Pre-emption Act. He should allow the parties to produce such oral and documentary evidence as is essential to the right decision thereof and make such further enquiry as he thinks fit. He must submit the evidence to this Court on or before the 1st October 1915 together with its findings thereon and the reason therefor. Either party may file objections to the return within ten days after the receipt thereof by this Court.

Appeal accepted.

No 15.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice Shadi Lal.

MUSSAMMAT THAKARI—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT GANESHI AND OTHERS—(DEFENDANTS)—
RESPONDENTS

Civil Appeal No. 1970 of 1913.

Indian Limitation Act, IX of 1908, articles 120 and 125—limitation for suit by remote reversioner to contest alienation by a widow—applicability of Punjab Limitation Act, I of 1900.

Held that the Punjab Limitation Act, I of 1900, is not applicable to suits in which the alienation challenged has been made by a woman.

33 P. R. 1911 (F. B.) (1), referred to.

Held also, that the article of the Indian Limitation Act applicable to a suit for a declaration in respect of a widow's alienation is article 125, where

(1) 33 P. R. 1911 (F. B.) (*Khiali Ram v. Gulab Khan*).

the plaintiffs are immediate reversioners and article 120 where they are remote reversioners.

I. L. R. 22 All. 33 (F. B.) (1), referred to.

*Second appeal from the decree of W. A. LeRossignol, Esquire,
Divisional Judge, Ambala, dated the 10th July 1913.*

Morrison, for Appellant.

Devi Das, for Respondents.

The Judgment of the Court was delivered by—

SHADI LAL, J.—After hearing Mr. Morrison for the 5th June 1915. appellant, we have no hesitation in concurring with the lower Courts that the plaintiff's suit is barred by time under article 120 of the Limitation Act. It appears that, on the death of Narain Singh, his estate was mutated, one-half in favour of his widow Mussammat Biro, and the other half in favour of the second widow Mussammat Kanwar Dei, and the widow of his deceased son Mussammat Ganeshi, in equal shares. The Revenue Officer upon objection by Mussammat Ganeshi subsequently modified his previous order by removing the name of Mussammat Kanwar Dei, with the result that Mussammat Ganeshi was recorded as owner of one-half instead of one-fourth. This decision of the Revenue Officer led to an action by the two widows of Narain Singh against Mussammat Ganeshi and it was in the course of that suit that a compromise was arrived at in February 1902 between Mussammat Ganeshi and Mussammat Kanwar Dei by which it was agreed that Mussammat Ganeshi was to obtain one-fourth of Narain Singh's estate and on the death of Mussammat Kanwar Dei was also to inherit the latter's one-fourth. It may be noted that Mussammat Biro did not agree to this compromise and continued the suit against Mussammat Ganeshi, which was ultimately dismissed on the merits.

The present suit is by Mussammat Thakari, the daughter of Narain Singh by Mussammat Kanwar Dei, for the usual declaration that the compromise is invalid as against the plaintiff and that it shall not affect her when the succession opens out. It is quite clear that, under the law applicable to the parties, the person entitled to succeed to the property on the death of Mussammat Kanwar Dei is Mussammat Biro and that the plaintiff has no right to possess the land in her presence. Now article 125 is applicable to an action brought by an immediate reversioner, and the suit by a remote reversioner for a declaration is governed by article 120 (*vide*

inter alia, I. L. R. 22 All. 33 F. B.) (1). It is manifest that under the latter article the present suit, which was instituted more than six years after the date of the compromise, is barred by limitation. Mr. Morrison frankly admits therefore that article 125 has no applicability to a case of this kind.

The learned counsel however contends that the Punjab Limitation Act, I of 1900, governs this suit and that the period of limitation is twelve years. He is unable to cite any authority in support of his contention which, we observe, is opposed to the express words of the statute. The Legislature lays down in clear and unequivocal terms that the law of limitation prescribed by that statute is applicable to an alienation by a "male proprietor" and we are therefore unable to accept the argument that the word "male" should be interpreted as including "female." There is absolutely no authority in favour of this construction, and the observations in 33 P. R. 1911 (F. B.) (2) are against the appellant's contention. We have accordingly no hesitation in holding that Act I of 1900 is confined in its operation to alienations by male proprietors and that those effected by females are governed by the ordinary law of limitation.

We accordingly uphold the judgment and decree of the Lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

No. 16.

*Before Hon. Mr. Justice Chevis and Hon. Mr.
Justice Shadi Lal.*

JAS RAM—(DEFENDANT)—APPELLANT,

Versus

ATTAR CHAND AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1832 of 1913.

*Indian Limitation Act, IX of 1908, articles 64 and 85—Punjab Loans
Limitation Act, I of 1904—limitation—suit on balance struck—notation.*

The dealings between the parties began about the beginning of 1905 and balances were struck in May, July and November 1905. The plaintiff sued in February 1911 for the balance due. The dealings between the parties were of various kinds, entries had to be made sometimes to defendants' debit, sometimes to their credit—accounts were kept by plaintiffs only.

Held, that a mere acknowledgment of a debt is neither an account stated nor is it evidence of a new contract.

(1) (1899) I. L. R. 22 All. 33 (F. B.) (*Bhagwanta v. Sukhi*).
(2) 33 P. R. 1911 (F. B.) (*Khiali Ram v. Gulab Khan*).

I. L. R. 23 All. 502 (1), 3 P. R. 1878 (F. B.) (2), and 68 P. R. 1904 (3), referred to.

Held also, that the words baqi deone at the end of the balance struck did not make it a new contract.

119 P. R. 1908 (4) and I. L. R. 8 Bom. 405 (5), referred to.

Held therefore, that the suit was governed by article 85 of the Limitation Act and not by article 44 and the Punjab Loans Limitation Act, and was consequently barred by time.

I. L. R. 10 Mad. 199 (6), referred to.

Second appeal from the decree of Rai Sahib Lal Bishambar Dyal, Additional Divisional Judge of Shahpur, at Lyallpur, dated the 14th July 1913.

Gokal Chand and Bahadur Chand, for Appellant.

Nanak Chand, for Respondents.

The Judgment of the Court was delivered by—

CHEVIS, J.—The plaintiffs sue for an amount due on *bihi* 5th June 1915.
accounts. The first Court held that article 85 of the First Schedule of the Limitation Act applied and dismissed the suit as time-barred. The Divisional Judge on appeal held that article 64 applied, and the period of limitation being six years under the Punjab Loans Limitation Act, he held the claim to be within time and gave the plaintiffs a decree. The defendants appeal.

Limitation is the only question for decision in this appeal. The nature of the dealings between the parties is stated in the judgment of the first Court (see page 5 of the paper book). Dealings between the parties began about the beginning of 1905, and balances were struck in May, July and November 1905. The last is the balance in question. The wording of this balance will be found on page 5 of the paper book. For the plaintiffs it is contended that this is a case of an "account stated," within the meaning of article 64. Defendants contend that article 85 applies, and that the period of limitation is only three years. The real question is whether the balance is merely an acknowledgment of an existing debt or whether it also contains a promise to pay.

23 All. 502 (1) lays down that a mere acknowledgment of a debt is neither an account stated, nor is it evidence of a

(1) (1901) *I. L. R. 23 All. 502 (Ganga Prasad v. Ram Dayal)*.

(2) 3 P. R. 1878 (F. B.) (*Ratta Ram v. Mussammat Nano*).

(3) 68 P. R. 1904 (*Ganpat v. Daulat Ram*).

(4) 119 P. R. 1908 (*Pala Mat v. Tulla Ram*).

(5) (1884) *I. L. R. 8 Bom. 405 (Ranchoddas v. Jey Chand)*.

(6) (1887) *I. L. R. 10 Mad. 199 (Lakshmayya v. Jagannatham)*.

new contract. Various older rulings are cited, and the difference between the law in England and in this country is pointed out, and it is also pointed out that if such an acknowledgment were an "account stated" within the meaning of article 64, or were evidence of a new contract, section 19 of the Limitation Act would be a dead letter.

In 3 *P. R.* 78 (1), a Full Bench ruling, it is also held that if the statement of account is nothing more than a mere acknowledgment this is not a fresh contract, and does not amount to an "account stated." This ruling has been followed in later rulings of this Court (*vide* 68 *P. R.* 1904 (2) and others) and we have no hesitation in following it.

Next comes the question whether this particular balance contains a promise to pay. It certainly winds up with the words *baqi deone*, but we are unable to draw any distinction between this phrase and the phrase *baki dena rahe* which is to be found in 119 *P. R.* 1908 (3), or the phrase *baki deva* found in 8 *Bom.* 405 (4). As far as we can see all three phrases are simply equivalent to the English phrase "balance due," and, though an acknowledgment, do not amount to a promise to pay.

We hold therefore that article 64 is inapplicable.

Counsel for the plaintiffs has not argued that any other article applies, though he contends that article 85 does not apply to such a case. For the defendants it is contended that if article 85 does not apply article 83 applies at least to a part of the case. The dealings between the parties were of various kinds. Entries had to be made sometimes to defendant's debit, sometimes to their credit. The mere fact that accounts are kept by one side alone is no sufficient reason for holding that the account is not an open, mutual and current account within the meaning of article 85; see 10 *Mad.* 199 (5).

We hold that article 85 is applicable and the claim is time-barred.

We therefore accept this appeal, and reversing the decision of the Lower Appellate Court we restore that of the first Court dismissing the suit. The plaintiff will pay costs as ordered by that Court, but we leave the parties to bear their own costs

(1) 3 *P. R.* 1878 (*F. B.*) (*Ratta Ram v. Mussammat Nano*).

(2) 68 *P. R.* 1904 (*Ganpat v. Daulat Ram*).

(3) 119 *P. R.* 1908 (*Pala Mal v. Tulla Ram*).

(4) (1884) *I. L. R.* 8 *Bom.* 405 (*Ranchoddas v. Jey Chand*).

(5) (1887) *I. L. R.* 10 *Mad.* 199 (*Lakshmayya v. Jagannatham*).

in the Divisional Court and in this Court, as possibly the plaintiff would have sued in time had he not been misled into thinking that he would be in time under the Punjab Loans Limitation Act if he sued within six years.

Appeal accepted.

No. 17.

Before Hon. Mr. Justice Chervis and Hon. Mr. Justice Shadi Lal.

JAGAN NATH—(PLAINTIFF)—APPELLANT,

Versus

HAKIM AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 805 of 1913.

Torts—assault and battery—damages—amount of—whether question of fact or law—costs incurred in criminal prosecution, whether allowable.

Held, that the estimate of the amount of damages for assault and battery is a question of fact, unless such amount is beyond the legal limits, if any, or is assessed upon a wrong principle of law.

10 W. R. 164 (1), 13 W. R. 22 (2), 13 W. R. 391 (3) and 3 Cal. L. J. 140 (4), referred to.

1 P. R. 1915 (5), explained.

Held also, that the costs incurred by the plaintiff in a criminal action brought by him against the defendants are no part of the consequences of the wrong done by the latter and cannot therefore be recovered.

7 All. W. N. 104 (6), 1. L. R. 12 All. 166 (7), and 1. L. R. 32 Cal. 429 (8), referred to.

1. L. R. 4 All. 97 (9), dissented from.

Second appeal from the decree of H. A. Rose, Esquire, Divisional Judge of the Sialkot Division, dated the 12th day of January 1913.

Nand Lal, for Appellants.

Duni Chand, for Respondents.

The Judgment of the Court was delivered by—

SHADI LAL, J.—This appeal and the cross-appeal No. 888 7th June 1915.
of 1913 arise out of an action brought by the plaintiff Jagan Nath against the defendants for damages for assault and

(1) (1868) 10 W. R. 164 (*Banee Madhub Chatterjee v. Bholanath Banerjee*).

(2) (1870) 13 W. R. 22 (*Joheerooddeen Mahomed v. Dabee Pershad*).

(3) (1870) 13 W. R. 391 (*Singh*).

(4) (1898) 3 Cal. L. J. 140 (*Jogeswar Sarma v. Dinaram Sarma*).

(5) 1 P. R. 1915 (*Godha Ram v. Devi Das*).

(6) (1887) 7 All. W. N. 104 (*Chandan v. Sumera*).

(7) (1889) 1. L. R. 12 All. 166 (*Fazal Imam v. Fazal Rasul*).

(8) (1905) 1. L. R. 32 Cal. 429 (*Churamoni Dasi v. Baidya Nath Naik*).

(9) (1881) 1. L. R. 4 All. 97 (*Ram Lal v. Tula Ram*).

battery. The Court of first instance assessed the damages at Rs. 364. The plaintiff and the defendants both preferred appeals to the Divisional Judge who dismissed the appeal of the latter and accepting that of the former enhanced the amount to Rs. 614. Both parties being dissatisfied with the decision of the lower Appellate Court have appealed to this Court and these appeals may conveniently be disposed of by one judgment.

The damages awarded by the lower Courts include *inter alia* an item of Rs. 164, which represents the costs incurred by the plaintiff in successfully prosecuting the defendants for causing hurt, and for the reasons to be set forth hereafter we are of opinion that the plaintiff is not legally entitled to recover the expenses of the criminal litigation. In regard to the remaining items, the learned Judge of the lower Appellate Court has, after full consideration of the evidence, decided that the plaintiff is entitled to the medical expenses incurred by him and also to damages for mental and physical injuries, and has estimated the amount of damages with reference to all the circumstances of the case. It is clear that there is no principle of law involved which would justify interference in a second appeal, and the decision being based upon facts is obviously not open to objection in this Court. The *dictum* of the learned Chief Judge in 1 P. R. 1915 (1) that the question of "the *quantum* of damages can be considered in second appeal," which has been cited before us, is no authority for the proposition that a finding as to the amount of damages arrived at after a consideration of all the relevant facts is liable to be disturbed in second appeal, when the legal liability is beyond dispute and the contest is confined to the sum of money which should be paid by one party to the other. The report of that case does not show on what grounds the decision on damages was attacked, and we doubt very much whether the brief observation contained therein was intended to lay down the broad proposition which the learned counsel for the plaintiff wants to deduce from it.

In England, the amount of damages to be awarded is a question for the Jury and in India the same function is performed by the subordinate Courts. We think the decision of the lower Courts estimating the amount of damages is a question of fact, unless such amount is beyond the legal limits, if there are any, (*vide* 10 W. R. 164 (2),

(1) 1 P. R. 1915 (*Godha Ram v. Devi Das*).

(2) (1868) 10 W. R. 164 (*Bance Madhub Chatterjee v. Bholanath Banerjee*).

13 W. R. 22 (1), 391 (2) and 3 C. L. J. 140) (3) or it is assessed upon a wrong principle of law. In the case before us we do not find any such error as would constitute a justification for our interference in second appeal.

Coming now to the item of Rs. 164 which has been allowed in lieu of the expenditure incurred by the plaintiff in the criminal action brought against the defendants, we are clear that the costs incurred in criminal proceedings are no part of the consequences of the wrong done by the defendants and they cannot therefore be recovered. It is manifest that the plaintiff was not bound to prosecute his assailants and that he might have obtained full satisfaction for the wrong done him without entering upon the criminal prosecution. The fact that he voluntarily resorted to a criminal Court to get the defendants punished is absolutely no reason for throwing upon them the liability for the expenditure incurred for a merely collateral purpose. We cannot regard it as damages which flowed from their wrongful act.

The case of an accused in a malicious prosecution bringing a Civil suit against his prosecutor and recovering as part of the damages, the money spent by him in defending himself in the criminal action, is for obvious reasons not parallel and no argument can therefore be deduced from it. The accused in that case has no alternative but to resist the indictment brought against him by the defendant, and a case of that kind clearly stands upon a different footing. Nor does the fact, that under section 545, Criminal Procedure Code, the criminal Court is empowered to order the whole or any part of the fine recovered from the convict to be applied in defraying expenses incurred in the prosecution, constitute a valid argument for holding that such expenses can be obtained by a Civil suit. There is no principle of law governing the award of damages for tort upon which the claim of the plaintiff can be sustained, and the conclusion reached by us is fully supported by the decisions of the Allahabad and Calcutta High Courts in Allahabad Weekly Notes of 1887, page 104 (4), *I. L. R.* 12 All. 166 (5), and *I. L. R.* 32 Cal. 429 (6). The only case, in which the contrary rule is enunciated, is an earlier judgment of the Allahabad High Court in *I. L. R.* 4 All. 97 (7) and it is note-

(1) (1870) 13 W. R. 22 (*Joheerooddeen Mahomed v. Dabee Pershad*).

(2) (1870) 13 W. R. 391 (*Singh*).

(3) (1898) 3 C. L. J. 140 (*Jogeswar Sarma v. Dinaram Sarma*).

(4) (1887) 7 All. W. N. 104 (*Chandan v. Sumera*).

(5) (1889) *I. L. R.* 12 All. 166 (*Fazal Imam v. Fazal Rasul*).

(6) (1905) *I. L. R.* 32 Cal. 429 (*Churamoni Dasi v. Baidya Nath Naik*).

(7) (1881) *I. L. R.* 4 All. 97 (*Ram Lal v. Tula Ram*).

worthy that it was expressly dissented from in the two subsequent judgments of that Court which are cited above.

Upon an examination of the general principles and the decided cases we have no hesitation in holding that the Courts below have erroneously decided that the expenses of the criminal prosecution should form part of the damages awardable to the plaintiff in an action of this kind. The result is that we dismiss the appeal No. 805 of 1913 preferred by the plaintiff, and accepting the appeal of the defendants (No. 888 of 1913) we modify the decree of the Lower Appellate Court by reducing the decretal amount to Rs. 614 — 164 = 450. In view of all the circumstances of the case we direct the parties to bear their own costs in this Court and to comply with the orders of the lower Courts as to costs incurred therein.

Appeal accepted.

No. 18.

*In fere Hon. Mr. Justice Shah Din and Hon. Mr. Justice
LeRossignol.*

MEHR BAKHSH—(DEFENDANT)—APPELLANT,

Versus

SANJHE KHAN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 616 of 1912.

Transfer of Property Act, 1882, section 99—not to be applied in the Punjab—Civil Procedure Code, 1908, order 34, rule 14 explained—sale of equity of redemption in execution of a decree unconnected with mortgage bars suit by mortgagor for redemption of the mortgage.

The plaintiff had mortgaged his house to defendant with possession but remained in possession as defendant's tenant under a lease. Defendant sued the plaintiff for arrears of rent and obtained a decree; and in execution of it he had the equity of redemption sold and purchased it himself with the permission of the Court. The auction sale was confirmed by the Court, plaintiff's objection to it being overruled. Plaintiff brought a regular suit to have the auction sale set aside, but the suit was dismissed and his appeal rejected. The plaintiff now sued defendant for redemption of the mortgage alleging that the sale of the equity of redemption could not affect his right to redeem the mortgage. The lower Courts concurred in decreeing plaintiff's claim on the principle underlying section 99 of the Transfer of Property Act, 1882.

Held, that having regard to the fact that section 99 of the Transfer of Property Act has been repealed by order XXXIV, rule 14 of the Code of Civil Procedure of 1908 and the rule of law set out in the section has been considerably modified by the said rule 14 and is technical in its nature, there is no good reason for applying the principle underlying section 99 to the Punjab.

Held also, that the principle of law embodied in order XXXIV, rule 14 of the Code of Civil Procedure is in favour of a mortgagee who purchases the equity of redemption at a Court sale in execution of a money decree obtained by him in satisfaction of a claim unconnected with the mortgage.

Held also, that even if section 99 of the Transfer of Property Act had been applicable to the case the sale was not void but merely voidable; objections had to be made before it was confirmed, and as the sale had been confirmed the purchaser obtained an indefeasible title whether he was an outsider or the mortgagee bidding with the leave of the Court.

I. L. R. 35 Cal. 61 (F. B.) (1) and I. L. R. 37 All. 165 (F. B.) (2), followed.

2 P. R. 1907 (3) and 15 P. R. 1911 (4), distinguished.

I. L. R. 29 Mad. 421 (5), I. L. R. 30 Mad. 362 (6), I. L. R. 32 Cal. 296 (P. C.) (7), I. L. R. 22 Mad. 347 (8), I. L. R. 22 Bom. 624 (9), 6 Indian Cases 47: S. C. 14 Cal. W. N. 579 (10), referred to.

Second appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore, dated the 13th January 1912.

Tirath Ram, for Appellant.

Gebind Das and Parduman Das, for Respondent.

The Judgment of the Court was delivered by—

SHAH DIN, J.—The material facts of this case are briefly these. On the 21st of December 1900 the plaintiff mortgaged the house in suit to the defendant for Rs. 700, and on the 7th of February 1901 a further charge of Rs 90 was created on the house, the total amount of the encumbrance being thus Rs. 790. The mortgage was one with possession, and it was stipulated in the mortgage-deed that the mortgagee shall not be entitled to recover the mortgage-money till after the expiry of ten years from the date of the mortgage, but that the mortgagor was at liberty to redeem the mortgage at any time within that period on payment of the mortgage-money. The mortgagor remained in possession of the house as tenant of the mortgagee on the strength of a deed of rent which he executed in favour of the latter. The mortgagee sued the mortgagor for arrears of rent, and on the 19th January 1904 obtained a money decree for Rs. 157-8-0 and costs. In execution of this decree the mortgagee had the equity of redemption of the house attached, and it was ultimately purchased by the mortgagee himself,

12th June 1915.

(1) (1907) *I. L. R. 35 Cal. 61 (F. B.) (Ashutosh Sikdar v. Behari Lal)*.

(2) (1915) *I. L. R. 37 All. 165 (F. B.) (Lal Bahadur Singh v. Abharan Singh)*.

(3) *2 P. R. 1907 (Jagan Nath v. Budhwa)*.

(4) *15 P. R. 1911 (Moti Ram v. Harbhagwan Das)*.

(5) (1905) *I. L. R. 29 Mad. 421 (Nannurien v. Muthsami Dikshadar)*.

(6) (1907) *I. L. R. 30 Mad. 362 (Dharanikota v. Budharazu Surayya)*.

(7) (1904) *I. L. R. 32 Cal. 296 (P. C.) (Khizarajmal v. Daim)*.

(8) (1898) *I. L. R. 22 Mad. 317 (Mayan Pathuti v. Pakuran)*.

(9) (1897) *I. L. R. 22 Bom. 624 (Martand Balkrishna v. Dhondo)*.

(10) (1910) *6 Indian Cases 47: 14 Cal. W. N. 579 (Panchan Lal v. Kishun Pershad)*.

with the permission of the Court, on the 23rd February 1906 for Rs. 250. The auction-sale was confirmed on the 30th March 1906. Meanwhile, on the 29th March 1906 the mortgagor had applied to the Court (as he had done once before) for permission to alienate the house privately and to satisfy the decree; but this application was rejected on the 30th March 1906, the sale being confirmed on the same date. The mortgagor preferred an appeal against this order, but the appeal was dismissed on the 29th of November 1906. A petition for revision was filed in this Court, but it was rejected on the 7th December 1907. In the meantime, on the 4th of June 1907 the mortgagor made an application for review of the order confirming the sale; but this application was rejected on the 30th August 1907. An appeal against this order was dismissed on the 28th of April 1908, and a petition for revision was rejected by this Court on the 7th of April 1909. The mortgagor also brought a regular suit on the 11th April 1906 to have the auction sale set aside, but the suit was dismissed on the 27th of July 1906 on the ground that it was barred by section 244, Civil Procedure Code, 1882.

On the 6th of October 1909 the suit which has given rise to the present appeal was instituted by the plaintiff-mortgagor against the defendant-mortgagee for redemption of the house on payment of Rs. 790. The suit was based principally on the grounds that under the terms of the mortgage-deeds, dated the 21st December 1900 and the 7th February 1901 the plaintiff was entitled to redeem the mortgage at any time on payment of Rs. 790, that the sale of the equity of redemption in favour of the defendant in execution of his money-decree against the plaintiff was *null and void*, and that the plaintiff's right of redemption was unaffected thereby. The defendant pleaded that the equity of redemption having been validly sold to him in execution proceedings connected with his money-decree against the plaintiff, dated the 19th January 1904, and the sale having been confirmed by the executing Court and the plaintiff's objections thereto having been overruled, i.e. (the defendant) had become owner of the house and the plaintiff's mortgage had become irredeemable. Both the Courts below have held that, having regard to the principle underlying section 99 of the Transfer of Property Act, 1882, which was applicable to this case, the plaintiff had a subsisting right of redemption notwithstanding the auction sale of the equity of redemption in favour of the defendant having been confirmed on the 30th March 1906; and the Courts have accordingly concurred in decreeing the plaintiff-mortgagor's claim.

The defendant-mortgagee has preferred a second appeal to this Court; and the sole question which we have to decide is whether or not the auction sale of the equity of redemption in favour of the defendant which was confirmed by the executing Court on the 30th March 1906 can be treated as a nullity and whether the plaintiff had or had not a subsisting right of redemption at the date of suit according to the terms of the mortgage deed. For the defendant-appellant reliance was placed on the following authorities: *I. L. R.* 29 *Mad.* 421 (1); *I. L. R.* 30 *Mad.* 362 (2); *I. L. R.* 32 *Cal.* 296 (*P. C.*) (3); *I. L. R.* 35 *Cal.* 61 (*F. B.*) (4); *I. L. R.* 37 *All.* 165 (*F. B.*) (5); and 15 *P. R.* 1911 (6). On the other hand, the pleader for the plaintiff-respondent cited *I. L. R.* 22 *Mad.* 347 (7) *I. L. R.* 22 *Bom.* 621 (8); 6 *Indian Cases* 47 *S. C.* 14 *C. W. N.* 579 (9); and 2 *P. R.* 1907 (10).

We have consulted all these authorities, but we consider it unnecessary to discuss them in detail as in our opinion the Full Bench decisions of the Calcutta and Allahabad High Courts referred to above lay down correctly the law applicable to a case like the present, and reading those decisions together, our view is that the present plaintiff had no subsisting right of redemption at the date of suit.

Section 99 of the Transfer of Property Act on which the plaintiff's case rests ran as follows:—

“Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.”

The above section was repealed by order XXXIV, rule 14 of the Civil Procedure Code, 1908. Rule 14 of order XXXIV runs as follows:—

‘(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under

- (1) (1905) *I. L. R.* 29 *Mad.* 421 (*Nannuvien v. Muthsami Dikshadar*).
- (2) (1907) *I. L. R.* 30 *Mad.* 362 (*Dharanikota v. Budharazu Surayya*).
- (3) (1904) *I. L. R.* 32 *Cal.* 296 (*P. C.*) (*Khizarajmal v. Daim*).
- (4) (1907) *I. L. R.* 35 *Cal.* 61 (*F. B.*) (*Ashutosh Sikdar v. Behari Lal*).
- (5) (1905) *I. L. R.* 37 *All.* 165 (*F. B.*) (*Lal Bahadur Singh v. Abhuran Singh*).
- (6) 15 *P. R.* 1911 (*Moti Ram v. Harbhagwan Das*).
- (7) (1898) *I. L. R.* 22 *Mad.* 347 (*Mayan Pathuti v. Pakuran*).
- (8) (1897) *I. L. R.* 22 *Bom.* 621 (*Martand Balkrishna v. Dhondo*).
- (9) (1910) 6 *Indian Cases* 47; 11 *Cal. W. N.* 579 (*Panchan Lal v. Kishun Pershad*).
- (10) 2 *P. R.* 1907 (*Jagan Nath v. Budhwa*).

“ the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in order II, rule 2 ”

“ (2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.”

It will be observed that rule 14 of order XXXIV just cited is narrower in its operation than section 99 of the Transfer of Property Act which it has replaced. Under section 99 the mortgagee was precluded from selling the mortgaged property otherwise than by instituting a suit under section 67 of the Act under any claim, although it might have no connection whatever with the mortgage-debt. Rule 14 of order XXXIV of the Civil Procedure Code is, however, restricted to claims arising only under the mortgage and it is now competent to the mortgagee to have the equity of redemption sold in satisfaction of any debt which he might have against the mortgagor unconnected with the mortgage. The principle of law embodied in rule 14 aforesaid is thus clearly in favour of a mortgagee who purchases the equity of redemption at a Court sale in execution of a money-decree obtained by him against the mortgagor in satisfaction of a claim unconnected with the mortgage; and it is exceedingly difficult to see how, in view of the change of the law thus effected by the latest legislative enactment on the subject under consideration, the Courts of this Province, to which the Transfer of Property Act has never been extended, can recognize and act upon the technical rule embodied in section 99 of the Act.

Neither of the two rulings of this Court cited before us, *viz.*, 2 P. R. 1907 (1) and 15 P. R. 1911 (2) can apply to the facts of this case, though it must be admitted that certain observations in the judgment of the learned Judge in the earlier case are in favour of the plaintiff, while in the later case the late learned Chief Judge (Sir Arthur Reid) employs a process of reasoning which is very favourable to the defendant. The two decisions which are really material to the present case are, as stated above, *I. L. R. 35 Cal. 61 (F. B.)* (3) and *I. L. R. 37 All. 165 (F. B.)* (4).

(1) 2 P. R. 1907 (*Jagan Nath v. Budhwa*).

(2) 15 P. R. 1911 (*Moti Ram v. Harbhagwan Das*).

(3) (1907) 35 Cal. 61 (F. B.) (*Ashutosh Sikdar v. Behari Lal*).

(4) (1915) *I. L. R. 37 All. 165 (F. B.)* (*Lal Bahadur Singh v. Abharan Singh*).

In the first mentioned case it was held by a Full Bench of the Calcutta High Court that a sale held in contravention of the terms of section 99 of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on proof that the terms of that section have been contravened. The application to set aside such a sale must be made under section 244 of the Code of Civil Procedure, 1882, and must be made before confirmation of the sale unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale.

In the other case a Full Bench of the Allahabad High Court has held that if a mortgagee brings the mortgaged property to sale in contravention of the provisions of section 99 of the Transfer of Property Act, 1882, such sale is not void, but merely voidable. If such a sale is confirmed, the auction purchaser, whether he be an outsider or the mortgagee bidding with the leave of the Court, obtains an indefeasible title, and the right of the mortgagor and those who represent him to redeem is absolutely extinguished.

In the present case the plaintiff-mortgagor was a party to the execution proceedings relating to the money-decree for rent obtained by the defendant-mortgagee against him, and it is not disputed that he had full knowledge of the auction sale and of its confirmation by the Court. He did his best to get the auction sale set aside, but all his efforts proved fruitless, and under the sale the equity of redemption passed to the mortgagee, who thus became full owner of the mortgaged premises. According to the principle embodied in rule 14 of order XXXIV, Civil Procedure Code, the auction sale of the equity of redemption in favour of the present defendant was a perfectly good one; and since it was duly confirmed by a competent Court, it had the effect of extinguishing the plaintiff's proprietary rights in the mortgaged house and his right of redemption was therefore lost.

For the foregoing reasons, we accept this appeal and setting aside the decree of the lower Appellate Court dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

No. 19.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Shah Din.

BARKAT ALI AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MUSSAMMAT SULTAN BIBI AND OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1285 of 1913.

Custom—Alienation—Gift of ancestral land to daughter in presence of collaterals in third degree—Quraishi Sheikhs of Mauza Hardosheikh, Tahsil Phillour, district Jullundur—Muhammadan Law.

In a suit brought by the collaterals of a sonless Quraishi proprietor of village Hardosbeikh in *Tahsil* Phillour who were related to him in the third degree to contest a gift of ancestral property made by him to his daughter.

Held, that the Quraishi Sheikhs of the said *mauza* Hardosheikh, are governed by custom and not by Muhammadan Law, but that the custom applicable would favour females to a greater extent than would the custom prevailing among indigenous Muhammadan tribes.

101 P. R. 1902 (1) and 5 P. R. 1906 (2), referred to.

Held also, that having regard to the fact that the Quraishis of this village are an endogamous tribe, that the donee is married to a collateral who is of the same degree of propinquity as the plaintiffs, that the only other permanent cultivators in the village are Arains among whom gifts to daughters are freely allowed, the *onus* of proving the validity of the gift of ancestral land which lay on the daughter was very light indeed and had been amply discharged.

Second appeal from the decree of L. H. Leslie Jones, Esquire, Divisional Judge, Jullundur, dated the 26th of March 1913.

Rambhaji Datta, for Appellants.

Muhammad Shafi, for Respondents.

The Judgment of the Court was delivered by—

SHAH DIN, J. — By a registered deed, dated the 10th July 1907, one Mauj Din, a Quraishi Sheikh of village Hardosheikh in *Tahsil* Phillour, District Jullundur, gifted 153 *kanals* 2 *marlas* of land to his daughter Mussammat Sultan Bibi; Mauj Din died in the beginning of 1912, and in April 1912 the suit out of which this appeal has arisen was brought by some of his collaterals, who were related to him in the third degree, for possession of their shares of the land gifted, alleging that by custom Mauj Din had no power to make a gift of the land in suit in favour of his daughter in the presence of the plaintiffs.

(1) 101 P. R. 1902 (*Ghulam Shah v. Zain Shah*).

(2) 5 P. R. 1906 (*Jowahir Singh v. Yaqub Shah*).

The donee Mussammat Sultan Bibi is married to one Jamal Din, a collateral of her father, and Jamal Din and the other collaterals of Mauj Din who belong to Jamal Din's branch of the family, have refused to join with the plaintiffs in this suit. The defendant Sultan Bibi pleaded, *inter alia*, that the land in suit was not the ancestral property of her father *qua* the plaintiffs; that the parties were governed by Muhammadan Law and not by custom; and that the plaintiffs were not competent to object to the gift in question. The Munsif held that the plaintiffs had failed to prove that the land in suit had been held by the common ancestor of Mauj Din and the plaintiffs, and that therefore they had no *locus standi* to contest the gift made by Mauj Din. Further, he held that assuming the property to be ancestral, the parties were governed by custom and not by their personal law; but that under the custom applicable to them Mauj Din, who belonged to the endogamous tribe of Quraishi Sheikhs had power to make a gift of his land in favour of his daughter. Upon these grounds the Munsif dismissed the plaintiff's suit.

On appeal the learned Divisional Judge held that the land in suit was partly ancestral and partly self-acquired in the hands of Mauj Din; but he was of opinion that even as regards the ancestral portion of the property in question, Mauj Din had by custom full power to make a gift of it to his daughter in the presence of his collaterals. Accordingly, the learned Judge maintained the decree of the Munsif and dismissed the appeal.

A second appeal has been preferred by the plaintiffs to this Court on the strength of a certificate given to them by the Divisional Judge on the question of custom involved in the case. We have heard Pandit Rambhaji Datta for the appellants at some length and have carefully scrutinized the instances discussed by him in the course of his argument and which are referred to by the learned Divisional Judge in his judgment; and we have not thought it necessary to call upon the learned counsel for the respondents as in our opinion the decision of the learned Judge is perfectly sound and must be maintained.

The first question for decision is whether the parties are governed by their personal law or by custom; and upon this point we agree with the Divisional Judge that since the Quraishis in village Hardosheikh form a compact community of proprietors and have been cultivating land for at least twelve generations, they are governed by custom and not by

Muhammadan Law. This view is strengthened by the fact that the *wajib-ul-arz* of the village lays down provisions relating to a widow's life estate and restrictive of the proprietor's powers of alienation similar to those which are to be found in villages inhabited by dominant agricultural tribes. We must, however, bear in mind that the Quraishis originally came from Arabia and are not a dominant agricultural tribe in this Province; and that, as held in several recent decisions of this Court, although they may have held land for generations and may be governed by customary rules, they would naturally try to adhere, as far as possible, to the principles of their personal law, and the custom applicable to them would favour females to a greater extent than would the custom prevailing among indigenous Muhammadan tribes (*see* No. 101 *P. R.* 1902 (1) and No. 5 *P. R.* 1906 (2)). In the last mentioned case the following important observations occur in the judgment of the Division Bench at page 13 :—

“ Speaking generally, it may, we think, be safely predicated of Quraishis that they are not members of an agricultural tribe. They belong to a tribe which came originally from Arabia, or at least tradition so has it, and they claim to be the tribe to which the prophet belonged. *Prima facie*, therefore, the members of this tribe would be zealous of adhering to the principles of their personal law, the Muhammadan Law, and in their case, even when we find them holding land, ‘ the same *presumption* cannot be predicated ’ regarding them as a class ‘ as may properly be made, as a result of experience in regard to agricultural tribes either personally or in particular localities ’ (Plowden, S. J, in *Khazun Singh v. Maddi* (3)). In all such cases, where the parties belong to a tribe or community which is not well-known to be one of the dominant agricultural tribes of the Province, strong proof is, in our opinion, needed before the Courts can conclude that they are regulated in matters relating to succession, alienation and the like questions, by the rules observed, commonly, by the members of such dominant agricultural tribes. Mere land ownership is not *per se* sufficient proof of this in such cases.”

In the present case the Divisional Judge, after noting that the Quraishis form a compact community and that there are no proprietors belonging to any other tribe, says that :—

“ In this particular village it so happens that the only other permanent cultivators are some Arains who hold as

(1) 101 *P. R.* 1902 (*G'ulam Shah v. Zain Shah*).

(2) 5 *P. R.* 1906 (*Jowahir Singh v. Yaqub Shah*).

(3) 122 *P. R.* 1893 (*Khazan Singh v. Maddi*).

"occupancy tenants, and in this District it is now settled law
"that a sonless Arain can make a gift to his daughter. *Prima*
"*facie* if an Arain has such a power, a Quraishi is still more
"likely to have it, and I have no doubt that the *onus* against
"the gift is very slight indeed."

Having regard to the facts that the parties are Quraishi, that they belong to an endogamous tribe, that the donee Mussammat Sultan Bibi is married to a collateral of her father who is of the same degree of propinquity as the plaintiffs, that the only other permanent cultivators in the village are Arains among whom gifts to daughters are freely allowed, we entirely agree with the learned Divisional Judge that the *onus* of proving the validity of the gift which lay on Mussammat Sultan Bibi was indeed very light; and we further hold, in agreement with him, that that *onus* has been amply discharged by her.

Both the Courts below have referred to fifteen instances of gifts of land which are mentioned in the pedigree-table of the village prepared at the revised settlement as showing that the power of gift has so far been freely exercised by the Quraishi proprietors in favour of their daughters and daughters' husbands. We have carefully examined these instances in the light of the criticisms levelled against them by the appellants' pleader, and we find that although there are not so many instances of gifts to daughters and their husbands as the lower Courts would seem to make out, there is no doubt that the Quraishis of this village have been gifting ancestral land to their relations and to strangers without any objection on the part of their collaterals, and that all the instances taken together establish a very extensive power of disposition of land in this village. Of the fifteen instances given in the pedigree, Nos. 1, 12 and 13 are of gifts to sons-in-law; Nos. 14, 7 and 8 are of gifts to daughter's son, sister's son and sister's husband respectively; Nos. 2, 3, 9, 10 and 15 are of gifts to strangers; No. 4 is of a gift to wife's brother; and the rest are instances of gifts either to relations or to strangers under circumstances showing that a proprietor can deal with his land as he pleases.

Over and above these instances, the witnesses for the defendant have deposed to several instances of gifts to sons-in-law, to daughters, and to daughters' sons. These have been very fully dealt with by the learned Divisional Judge, and as they have not been discussed in detail by the appellant's pleader in his argument, it is unnecessary for us to notice them one by one in this place. What is clear is that the whole body of

instances relied upon by the donee furnishes an overwhelmingly strong case in favour of a Quraishi proprietor in this village possessing the power to make a gift of ancestral land to his daughter in the presence of his collaterals.

On the other hand, the plaintiffs rely on the decision of Mr. Holder, Subordinate Judge, Jullundur, dated the 23rd December 1902, in the case of *Shah Muhammad v. Hakim Shah* and upon five oral instances. The parties to the case decided by Mr. Holder were residents of the village to which the present parties belong; a Quraishi proprietor, who had a son, had sold his land in favour of his son-in-law; and on a suit by his near collaterals the sale was set aside as invalid. But the real finding of the Court, as pointed out by the learned Divisional Judge in this case, was that the alleged sale was fictitious, and the Court failed to notice that the real intention of the alienor seems to have been to make a gift in favour of his son-in-law. The question whether a sonless Quraishi proprietor could make a gift in favour of his daughter, is in no way affected by the decision of Mr. Holder, and it has been rightly disregarded by the Divisional Judge. The oral instances relied upon by the plaintiffs have been shown by the Divisional Judge to be too indefinite to be of any practical value, and some of the facts disclosed in connection with those instances seem to favour the contention of the donee in the present case that where a daughter is married to a collateral of her father her right to hold her father's land is well recognised.

Upon a careful review of the whole evidence in the case, we hold that in this village of Hardosheikh a sonless Quraishi proprietor is empowered by custom to make a gift of his ancestral land to his daughter in the presence of his collaterals. We accordingly maintain the decree of the learned Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

No. 20.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Le Rossignol.

MUSSAMMAT MAYA DEVI AND ANOTHER—
(DEFENDANTS)—APPELLANTS,

Versus

RAM CHAND—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1274 of 1913.

Hindu Law—marriage—solemnized in Sangat year—validity of—in absence of consent of guardian—mother's right to select a husband for her

daughter—marriage effected in disregard of direction of Court not to affect a marriage without its sanction.

Held, that a marriage between Hindus is not invalid merely because it was solemnized in a *sangat* year which may be regarded inauspicious by the astrologers.

Held also, that in the event of the father and paternal male relations having, by death or waiver, lost their right to give a female infant in marriage the right of selecting a husband for her devolves upon the mother and she is competent to give her in marriage.

Held also, that the fact that the mother was appointed guardian by the District Court with the direction that she should not perform the marriage of her minor daughter without the sanction of the Court and that notwithstanding this the mother effected the marriage without obtaining such sanction would not invalidate a marriage which was otherwise legally contracted.

I. L. R. 22 Bom. 509 (1), referred to.

Held further, that the rules of Hindu Law as to the duty of giving in marriage are directory and not mandatory and that in the absence of force or fraud, a Hindu marriage, otherwise legally contracted and performed with the necessary ceremonies, is not invalidated by the absence of consent of the guardian entitled to give such consent.

I. L. R. 14 Mad. 316 (2), *I. L. R. 19 All. 515 (3)*, *I. L. R. 22 Bom. 812 (4)*, referred to.

64 P. R. 1884 (5), distinguished.

Second appeal from the decree of H. F. Forbes, Esquire, Divisional Judge, Gujranwala Division, at Lahore, dated the 24th May 1913.

Muhammad Shafi, for Appellants.

Kirkpatrick and Tirath Ram, for Respondent.

The Judgment of the Court was delivered by—

SHADI LAL, J.—This second appeal arises out of an action brought by the respondent, Ram Chand, against his wife, Mussammat Maya Devi, for the restitution of conjugal rights. The facts which are relevant to the point of law in issue in this appeal are simple and may be stated in a few words. Mussammat Maya Devi's father died in 1903, and in 1905 Mussammat Radhi, her mother, was appointed her guardian by the District Court, with the direction that she should not perform the marriage of the minor without the sanction of the Court. It appears that the mother celebrated the marriage of her daughter with Ram Chand some time in 1909 without obtaining the necessary permission of the Court, and the *factum* of this

28th July 1915.

(1) (1896) *I. L. R. 22 Bom. 509 (Bai Diwali v. Moti Karson)*.

(2) (1890) *I. L. R. 14 Mad. 316 (Venkatacharyulu v. Rangacharyulu)*.

(3) (1897) *I. L. R. 19 All. 515 (Ghazi v. Sukru)*.

(4) (1897) *I. L. R. 22 Bom. 812 (Mul Chand Kuber v. Bhudhia)*.

(5) 64 P. R. 1884 (*Daval v. Narain Das*).

marriage is no longer in dispute. The cardinal point for consideration is whether the Court should refuse to recognise the validity of the marriage.

We may state at once that the fact that the marriage was solemnized in a *sangat* year does not render it invalid. A *sangat* year may be an inauspicious time, but there is no authority for holding that the marriage performed at a time regarded inauspicious by the astrologers should be treated as ineffectual in law. Nor do we consider that the disparity in the ages of the parties is such as would constitute a sufficient reason for setting aside the marriage which has been duly solemnized.

There was some discussion before us as to whether the marriage was performed in accordance with the Hindu rites, or whether it was what is commonly known an *Anani* marriage. The Courts below have not recorded a clear finding on this point, but the report of the Commissioner, who is a retired officer of judicial experience, is that the marriage was celebrated according to the ceremonies prescribed by the Hindu law, and we think his view is supported by the evidence on the record.

It is manifest that in the event of the father and paternal male relations having lost by death or waiver their right to give the girl in marriage the right of selecting the husband for a female infant devolves upon the mother; and Mussammatt Radhi was, according to the rules of Hindu law, fully competent to give her daughter in marriage. The rules as to the duty of giving in marriage are directory and not mandatory and it has been held over and over again that in the absence of force or fraud, a Hindu marriage otherwise legally contracted and performed with the necessary ceremonies is not invalidated by the absence of the consent of the guardian entitled to give such consent—*vide* *I. L. R. 14 Mad. 316* (1), *19 All. 515* (2) and *22 Bom. 812* (3). The judgment in *64 P. R. 1884* (4), does not lay down any rule to the contrary, and it appears that the Court on the peculiar circumstances of that case annulled the marriage because it was celebrated by the mother in opposition to her husband's authority, and because the marriage was found to be unnecessary and unsuitable. It is doubtful whether those circumstances would justify a Court in setting aside a Hindu marriage performed with the usual rites but the ruling has clearly no applicability to the case before us.

(1) (1890) *I. L. R. 14 Mad. 316* (*Venkatacharyulu v. Rangacharyulu*).

(2) (1897) *I. L. R. 19 All. 515* (*Ghazi v. Sukru*).

(3) (1897) *I. L. R. 22 Bom. 812* (*Mul Chand Kuber v. Bhudhia*).

(4) *64 P. R. 1884* (*Dayal v. Narain Das*).

It follows from the above discussion that if no proceedings had been taken under the Guardians and Wards Act, and if the mother had not been appointed guardian by the Court, the validity of the marriage in question, which was performed by her in good faith and for the welfare of the minor could not have been successfully contested in a Court of law. And we do not think that the absence of sanction has the effect of invalidating a marriage which is otherwise legally contracted. In fact the Bombay High Court in their Judgment in *I. L. R. 22 Bom. 509* (1), decided that the circumstance, that the marriage was celebrated in disobedience of the order of a Civil Court, did not invalidate it. In this view we entirely concur.

It will be observed that no male paternal relation of the father has raised any objection to the marriage, and that Beli Ram, who has been contesting the claim of the plaintiff, is the second husband of Mussammat Radhi and is not in any way related to the minor. We are unable to say whether it is his solicitude for the welfare of the minor, or some ulterior motive, which has actuated him in fighting out this case.

Upon a consideration of all the circumstances and the law bearing on the subject, we are satisfied that the marriage between Ram Chand and Mussammat Maya Devi is a valid transaction and that there is no cogent reason for disturbing the decree for restitution of conjugal rights granted by both the Courts below. We accordingly affirm the decree appealed from and dismiss the appeal with costs.

Appeal dismissed.

No. 21.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Le Rossignol.

NAND LAL—(PLAINTIFF)—APPELLANT,

Versus

JETHU MAL AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2434 of 1913.

Benami sale—whether person in possession of the property can be allowed to set up his own fraud.

The plaintiffs sued for possession of property under a deed of sale dated 17th June 1891 made by the father of defendants in favour of plaintiff's father. Defendants pleaded that the deed was *benami*, executed solely to save the property from the attacks of creditors. Plaintiffs urged that

defendants could not be allowed to set up their own fraud on the maxim *nemo allegans turpitudinem suam audiendus est*.

Held, that the maxim relied on by plaintiffs must give way to the maxim in *pari delicto potior est conditio possidentis* as the defendant was in possession of the property and that the latter could consequently be permitted to set up the true facts of the transaction.

13 Moo. I. A. 551 (P. C.) (1), 21 W. R. 422 (2), 24 W. R. 351 (3), I. L. R. 18 Bom. 372 (4), 8 Cal. W. N. 620 (5), I. L. R. 1 All. 403 (6), 61 P. R. 1895 (7), 25 P. R. 1905 (8), and I. L. R. 35 Cal. 551 (P. C.) (9), referred to.

I. L. R. 31 Bom. 405 (10) and I. L. R. 37 Bom. 217 (11), disapproved.

First appeal from the decree of Bhui Umrao Singh, District Judge of Amritsar, dated the 26th day of August 1913.

Gobind Das, for Appellant.

Broadway, Bhagat Ram Puri and Santanam, for Respondents.

The Judgment of the Court was delivered by—

30th July 1915.

LEROSSIGNOL, J.—Alleging that the properties exhibited on plans A, B, C had been sold for Rs. 2,000 by Taba Mal, father of defendant 1 and grandfather of defendants 2 to 4 to plaintiff's father by registered deed of 17th June 1891, plaintiff sued for possession of these properties.

Plaintiff's account of his dispossession as regards A and B is that defendants forcibly took possession in 1907, as regards C, that Taba Mal's widow Mussammat Rukman had a right of residence therein, that she died in 1905, that at her death defendants occupied the house as his tenants but subsequently denied his title.

Defendants allege that the sale-deed in favour of plaintiff's father is *benami*, executed solely to save the property from the attacks of creditors; that they have divided the property with the aid of plaintiff's father, that defendants 2 to 4 were allotted A, defendant 1 received B and the property C was divided between them and rebuilt at considerable

(1) (1870) 13 Moo. I. A. 551 (P. C.) (Ram Surun Singh v. Mussammat Pran Peary).

(2) (1874) 21 W. R. 422 (Sreemutty Debia v. Bimola Soonduree Debia).

(3) (1875) 24 W. R. 391 (Bykunt Nath Sen v. Goboolah Sikdar).

(4) (1893) I. L. R. 18 Bom. 372 (Babaji v. Krishna).

(5) (1903) 8 Cal. W. N. 620 (Preo Nath Koer v. Kazi Muhammad Shazid).

(6) (1877) I. L. R. 1 All. 403 (Param Singh v. Lalji Mal).

(7) 61 P. R. 1895 (Hafiz Abdul Karim v. Muhammad Yusuf).

(8) 25 P. R. 1905 (Jivan Singh v. Jora).

(9) (1908) I. L. R. 35 Cal. 551 (P. C.) (Petherpermal Chetty v. Muniandy Serrai).

(10) (1907) I. L. R. 31 Bom. 405 (Sidlingappa v. Hirasa).

(11) (1911) I. L. R. 37 Bom. 217 (Sayad Nahannu v. Sabinibibi).

expense by them. They deny that plaintiff or his father was even in possession, constructive or actual, of the property.

The District Judge has dismissed the suit finding that the suit is time-barred, that the plaintiff has not proved that the consideration for the sale was paid by his father, that the alleged partition is established, that plaintiff has never been in possession and has never dealt with the property.

The plaintiff prefers an appeal and challenges all these findings and his first point is that defendants cannot be heard to say that the sale deed was *benami* for their explanation is that the sale was a sham affair the sole object of which was to deceive creditors as to the extent of the vendor's assets.

The point has been the subject of some difference of opinion in the several High Courts and 31 *Bom.* 405 (1) and 37 *Bom.* 217 (2) appear to be in direct conflict with the Privy Council ruling reported in Moore's *I. A.* 13, p. 551 (3), the principles of which have been adopted in 21 *W. R.*, p. 422 (4), 24 *W. R.*, p. 391 (5), 18 *Bom.*, p. 372 (6), 8 *Cal. W. N.*, p. 620 (7), 1 *All.*, p. 403 (8). This Court also has followed the same lines in 61 *P. R.* 1895 (9) and 25 *P. R.* 1905 (10), and in 35 *Cal.* 551 (11), it was held that even a plaintiff could be heard to allege his own fraud, if the fraud had not been actually completed. The result is that there is a heavy balance of authority in favour of permitting the defendant to set up the true facts of the transaction; the maxim '*nemo allegans turpitudinem suam audiendus est*' gives way to the maxim *in pari delicto potior est conditio possidentis*.

It remains to consider whether the plaintiff's father paid the alleged consideration for the sale and whether he obtained possession of the property in whole or in part.

Plaintiff admits that though his father was a *shahukar* he has no books of his own to shew that the Rs. 2,000, the consideration for the sale, issued from his own resources. Plaintiff states that he does not know whence his father obtained the money. He produced two *bahis* of his father's time, but they

- (1) (1907) *I. L. R.* 31 *Bom.* 405 (*Sidlingappa v. Hiras*).
- (2) (1911) *I. L. R.* 37 *Bom.* 217 (*Sayad Nahannu v. Sabimibibi*).
- (3) (1870) 13 *Moo. I. A.* 551 (*P. C.*) (*Ram Suran Singh v. Mussammatal Pran Peary*).
- (4) (1874) 21 *W. R.* 422 (*Sreemutty Debia v. Bimola Soonduree Debia*).
- (5) (1875) 24 *W. R.* 391 (*Bykunt Nath Sen v. Goboollah Sikdar*).
- (6) (1893) *I. L. R.* 18 *Bom.* 372 (*Babaji v. Krishna*).
- (7) (1903) 8 *Cal. W. N.* 620 (*Preo Nath Koer v. Kazi Muhammad Shazid*).
- (8) (1877) *I. L. R.* 1 *All.* 403 (*Param Singh v. Lalji Mal*).
- (9) 61 *P. R.* 1895 (*Hafiz Abdul Karim v. Muhammad Yusuf*).
- (10) 25 *P. R.* 1905 (*Jivan Singh v. Jora*).
- (11) (1908) *I. L. R.* 35 *Cal.* 551 (*P. C.*) (*Petherpermal Chetty v. Muniandy Servai*).

contain no entry dealing with this alleged payment of Rs. 2,000. This omission is very significant.

Plaintiff goes on to allege that when the firm of Maharaj Mal Taba Mal became insolvent in 1890, his father was a creditor in Rs. 5,393 of that firm and that in liquidation of his claim, the firm known as Jethu Mal Badri Mal Rupa Singh was sold to him and the firm's business was continued by Jethu Mal as manager for plaintiff's father and he produces what purports to be his father's account with that firm, pages 9 to 17 of paper book.

Jethu Mal says that the account on pages 13, 14 was given by him to plaintiff's father merely to support the fictitious sale that plaintiff's father's debt owing by the firm of Maharaj-Taba Mal was subsequently paid off and he produces accounts (p. 53 *et seq.*) in support of his statement.

On p. 63 is a repayment of Rs. 800 and though plaintiff examined on 6th August 1913 on p. 129 asserted that he failed to remember such a payment, on p. 41 he admitted he had taken Rs. 800 from Jethu Mal, for he had to account for alleged expenditure on one of the houses in suit.

Jethu Mal's story is corroborated by the fact that the entries on p. 13 concerning rent give no details, and by the fact that the accounts came to an abrupt termination even on plaintiff's shewing in 1900.

Why has plaintiff no accounts later than that date?

I now turn to the question of possession of the property.

Now as regards the property C, to Mussammatt Rukman, widow of Taba Mal, was reserved a right of residence provided she executed a lease and paid rent. She lived in the house till her death in 1905; she executed no lease nor is any payment of rent by her proved.

This house was rebuilt in 1904 by the defendants, for the municipal sanction to build is in their favour.

Plaintiff's possession of this house is quite unproved, and he has failed to produce any lease or evidence of any kind in respect of B which was in Jethu Mal's possession. A had fallen to the share of Hira Nand's sons, who were minors under the care of their mother, Mussammatt Ram Kour.

The plaintiff has produced in respect of this property two leases both dated 1904, one by Wazira, the other by Alladitta; and another dated 1906 by one Hari Ram, but to what property this last deed refers is doubtful.

These documents are attested by Jethu Mal and he alleges he had them executed because of a quarrel with Mussammat Ram Kour. Alladitta moreover says he paid the rent to Jethu Mal and plaintiff has no accounts to show he has been receiving any rents from this property.

It is a further remarkable fact that these leases date only from 1904, and it is a matter for surprise that no leases of an earlier date are forthcoming.

We need not go into the point of limitation for our conclusion is that the sale to plaintiff's father was fictitious and that it was never acted upon and we maintain the lower Court's decree and dismiss the appeal with costs.

Appeal dismissed.

No. 22.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice LeRossignol.

SOHNA MAL—(PLAINTIFF)—APPELLANT,

Versus

NANAK CHAND—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 2318 of 1913.

Punjab Courts Act, III of 1914, section 41 (1) and 41 (3)—second appeal on point of custom without a certificate.

Held, that although under the provisions of sub-sections (1) and (3) of section 41 of the Punjab Courts Act, 1914, no second appeal is admissible in the absence of a certificate to decide "the existence or validity of a custom," the Chief Court is not debarred from remitting a case for decision of a point of custom which has been overlooked or deliberately neglected by the lower Appellate Court.

Second appeal from the decree of H. Forbes, Esquire, Divisional Judge, Gujranwala, at Lahore, dated the 11th July 1913.

Fazl-i-Hussain and Gokal Chand Narang, for Appellant.

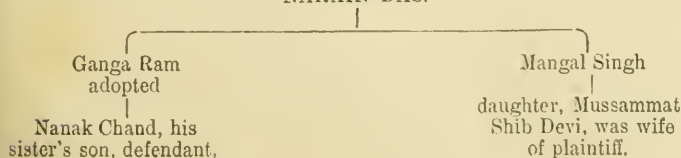
Nanak Chand, Hukam Chand and Mehr Chand, for Respondent.

The Judgment of the Court was delivered by—

LEROSSIGNOL, J.—In this appeal a preliminary objection 30th July 1915. that no appeal lies in the absence of a certificate is raised by the respondent.

The facts concisely put are as follows :—

NARAIN DAS.



Mangal Singh died in 1907, bequeathing all his property to his daughter. On her death in 1911, mutation was made in defendant's favour and in this suit plaintiff claims her property. The first Court framed an issue on the power of Mangal Singh to execute a will in his daughter's favour, and on the [results] flowing from the bequest, if found to be valid, and another general issue, whether plaintiff was his wife's heir *qua* the property bequeathed.

The first Court found that the parties were governed by custom and that Mangal Singh had no power to bequeath his ancestral immoveable property to the detriment of his reversioners. The first Court further held that an adopted son could succeed collaterally and it quoted the *Rivaj-i-am* as its authority.

The plaintiff's suit was accordingly dismissed and an appeal was preferred to the Divisional Judge who dismissed it, holding that collaterals excluded daughters, but giving no finding on the point of collateral succession by an adopted son.

This second appeal was then preferred to this Court and in it the whole question of custom is challenged including the right of an adopted son to succeed collaterally.

Now if the phrase "an appeal regarding the existence or validity of a custom" be taken in its ordinary sense, this is an appeal regarding the existence or validity of custom.

But it is argued that though it is an appeal regarding a custom in one sense, it is not so in another sense, inasmuch as this Court is not asked in the appeal to adjudicate on the existence or validity of the alleged custom, but is asked merely to order the lower Court to come to a finding on those points.

The natural meaning of section 41 (1) and 41 (3) of the Punjab Courts Act appears to be—

1(a) Even though the decision on custom by the Lower Appellate Court is wrong—

1(b) Even though the Lower Appellate Court has failed to determine a material point of custom—

1(c) Even though the Lower Appellate Court's procedure is marred by grave irregularities, still this Court shall not interfere unless the certificate has issued.

But the section is susceptible of another construction, *viz.*, though the Lower Appellate Court has committed all the above detailed errors still, unless the certificate was issued, this

Court shall not decide the question of custom, *i.e.*, have the final word in the matter, but short of interference on the question of custom, shall not be debarred from exercising its general power of control.

The possibility of the first Court of Appeal's entire failure to decide a point of custom furnishing the aggrieved party with no means of redress can hardly have been contemplated by the Legislature, consequently we feel justified in interpreting the section to mean that though this Court has no jurisdiction in the absence of a certificate, to decide the existence or validity of a custom, it is not debarred from remitting a case for decision of a point of custom which has been overlooked or deliberately neglected.

In this case therefore we accept the appeal, set aside the decree of the Lower Appellate Court and remand the case for redisposal after a decision on the question whether an adopted son among the parties succeeds as such to his adoptive father's collaterals.

Costs to follow final event. Stamps on appeal to be refunded.

Appeal accepted.

No. 23.

*Before Hon. Mr. Justice Scott-Smith and Hon. Mr.
Justice Shauli Lal.*

LELU AND OTHERS—(PLAINTIFFS)—APPELLANTS,
Versus

RAM CHAND AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 24 of 1912.

*Custom—succession—self-acquired property—Brahmans of mauza
Abbepur, thana Amb, tahsil Una, district Hoshiarpur—daughters or
collaterals—Riwaj-i-am.*

Held, that the *onus probandi* was on the collaterals to prove that by custom among Brahmans of tahsil Una they had a preferential right of succession to self-acquired property to daughters and that they had failed to discharge the *onus*.

42 P. R. 1910 (P. C.) (1), referred to.

*First appeal from the decree of Lila Kidar Nath, Additional
District Judge of Hoshiarpur, dated the 28th November 1911.*

Kirkpatrick and Sundar Das, for Appellants.

Amar Singh, Umar Bakhsh and Tek Chand, for Respondents.

The Judgment of the Court was delivered by—

11th Oct. 1915.

SCOTT-SMITH, J.—In the suit out of which this appeal has arisen, the plaintiffs claimed that as reversioners of Khushala Ram, deceased, sole proprietor of Abbeipur, they were entitled to his land after the death of his widows, defendants 2 and 3, to the exclusion of his daughters.

Defendants denied the *locus standi* of plaintiffs saying that they were not the reversioners of Khushala Ram and that the land was not their ancestral property.

The lower Court in an exhaustive judgment held that plaintiffs were no doubt distant collaterals of the deceased proprietor, though the exact degree of relationship, alleged by them, had not been established, but that the land was not plaintiffs' ancestral property and therefore they had no *locus standi* in the presence of daughters. It therefore dismissed the suit and plaintiffs appeal.

Mr. Kirkpatrick argued the appeal on behalf of the appellants, but we were so little impressed with his arguments that we did not find it necessary to hear counsel for respondents.

We have no hesitation in holding that plaintiffs, on whom the *onus* lay, 42 P. R. of 1910, Privy Council (1), have not proved that the land in dispute is their ancestral property.

The only evidence of any importance in appellants' favour is an entry in the *Nikasi* papers of *Sambat* 1904 (A. D. 1847), which shows the following persons as proprietors of small plots of land in the village of Abbeipur.

Ganga Ram, 3 *ghumaons*.

Ishar, 5 *ghumaons* $6\frac{1}{2}$ *kanals*.

Jawala, 4 *ghumaons* $4\frac{1}{2}$ *kanals*.

Chaita, 7 *kanals*.

Ganga Ram was father of Khushala Ram. The other three persons are, according to plaintiff-appellants, descendants of Kanhya. Even if they were proprietors in 1847 (they subsequently lost their proprietary rights and were recorded as occupancy tenants of the land in their possession), it does not follow that the land was ancestral of themselves and Ganga Ram. As members of the same brotherhood they may very well have been given small portions of the village to cultivate. We can make no assumption on the very slender evidence of this entry as to the land being ancestral *qua* the plaintiffs.

The land not having been proved to be ancestral *qua* plaintiffs, the *onus* lay very heavily upon them to show that

(1) 42 P. R. 1910 (P. C.) (*Atar Singh v. Thakar Singh*).

they would exclude daughters. Mr. Kirkpatrick points out that the defendants could very easily have proved by instances that daughters succeeded to self-acquired property in the presence of collaterals and that they have not adduced a single instance. It is quite possible that in this village the question of succession of daughters in presence of collaterals may never have come up. No doubt in neighbouring villages there may be instances in point, but the *onus* was upon the plaintiffs and it was hardly necessary for defendants to produce instances in support of their contention, when none had been adduced on the other side.

The entry in the *Riwaj-i-am* to the effect that daughters are excluded by collaterals is valueless for the purposes of this case. The *Riwaj-i-am*, in the absence of any clear statement to the contrary, is considered to apply to ancestral and not self-acquired property. No instances are cited in the *Riwaj-i-am* relied upon of cases where daughters have been excluded from non-ancestral property by collaterals.

We must adopt the general rule of custom in the absence of evidence to the contrary.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

No. 24.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice LeRossignol.

MUHAMMAD ISMAIL AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

GAURI PARSHAD—(PLAINTIFF)—AND MUSSAMMAT
HAIDRI BEGAM—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 2302 of 1913.

Guardians and Wards Act, VIII of 1890, section 30—duty of minors suing to avoid an alienation by guardian not expressly allowed by Court.

One Mussammat Haidri Begam in 1904 and 1905 on behalf of herself and as guardian of her two sons and her daughter mortgaged her deceased husband's property to plaintiff agreeing to pay interest at 9 per cent. per annum. The plaintiff sued for recovery of the mortgage-money and obtained a decree for Rs. 3,100 principal and Rs. 2,156-3-0 interest and costs against the defendants and the property under mortgage. The minor sons and daughter appealed to the Chief Court.

Held, that under section 30 of the Guardians and Wards Acts the alienation was merely voidable at the instance of the minors and although it was correct that the District Judge in sanctioning the raising of a loan by the widow did not expressly mention the rate of interest to be

allowed, the minors could not be granted their prayer, without on their part, restoring all benefits which they had received under their guardian's contract, i. e., they must restore the principal amount and also reasonable interest, and that 9 per cent. per annum was reasonable interest.

Held also, that although the term in the 1904 mortgage was four years, the lower Court was entitled to allow interest after due date by way of compensation or damages for at least six years after that date and that 9 per cent. per annum was reasonable compensation.

I. L. R. 19 All. 39 (P. C.) (1), referred to.

First appeal from the decree of Sardar Sahib Baba Mihan Singh, Subordinate Judge, 1st class, Delhi, dated the 9th August 1913.

Obedulla, for Appellants.

Bahadur Chand, for Respondents.

The Judgment of the Court was delivered by—

12th Oct. 1915.

RATTIGAN, J.—This is a first appeal from the order of the Subordinate Judge of the 1st class, Delhi, granting plaintiff a decree for Rs. 3,100 principal and Rs. 2,156-3-0 interest and costs, against the defendants and the property under mortgage. Plaintiff's claim was based on two mortgage-deeds executed on the 10th August 1904 and the 31st August 1905, respectively, by Mussammat Haidri Begam on behalf of herself and as guardian of her two sons, Muhammad Ismail and Muhammad Jamil, and her daughter, Begga Begam. Mussammat Haidri Begam has accepted the decree and the present appeal is filed by the said two sons and her daughter. The points urged before us are (1) that the District Judge did not in express terms sanction the agreement by Mussammat Haidri Begam to pay interest on the principal amounts of the two mortgages and that as a result the appellants and their property under mortgage are not liable, except to the extent of the said principal amounts; and (2) that in any event the mortgage of the 10th of August 1904 was merely for a period of four years and that consequently no interest can be claimed after the expiry of that period.

As regards the first point, we are inclined to accept the argument that the District Judge did not grant permission to the guardian to make any agreement regarding the payment of interest on the money borrowed by her. His orders are set forth at pages 28-30 of the record and apparently deal merely with the question whether the guardian should be

allowed to borrow sums of Rs. 2,400; Rs. 100 and Rs. 600 respectively. At the same time, it is quite clear from the statements made by Mussammat Haidri Begam in her applications, dated the 8th February 1904 and 29th April 1904, that the family was very badly off at the time and that there was every probability of their house (the subject-matter of the mortgage) being sold unless she could borrow money to pay off a prior mortgagee. In those applications she further alleges (and there appears to be no reason to doubt the truth of the statement) that she had no other means of livelihood or any money to maintain the minors.

In these circumstances, and having regard to the facts, that the agreement to pay interest and to make that interest a charge on the property, though not sanctioned by the District Judge, is under section 30 of the Guardians and Wards Act, 1890, merely voidable at the instance of the minors; that the guardian could not have succeeded in borrowing money unless she had agreed to pay interest; that the loan was in the interests and for the benefit of the minors; and that the rate of interest charged, *viz.*, 9 per cent. per annum, is by no means excessive, we can accede to the prayer of the minors that they should not be held bound by their guardian's agreement, only on the condition that they on their part must restore all benefits which they have received under their guardian's contract. In other words they must repay the principal amount and also reasonable interest thereon, the result being that to all intents and purposes we must uphold the order of the District Judge.

The contention that there was no liability to pay interest after the expiry of the four years which were specified as the term of the mortgage in the deed dated the 10th of August 1904, is based on the assumption that that deed automatically terminated after the expiry of that period. As a matter of fact the deed contains a provision to the effect that the mortgagor will remain bound by all the conditions of the deed until the payment of the entire principal mortgage-money and will also be liable to pay interest on the mortgage-money if, after the expiry of the said terms, the mortgage remains in force "with the consent of the parties." Mr. Obedulla, for the plaintiff, contends that this clause means that on the expiry of the term of four years the parties were to execute another mortgage-deed, or, at all events, to give their express consent to the continuance of the deed

of 1904. We cannot accept this construction, and we hold that the consent of the parties could be given, as it undoubtedly was in the present case, impliedly no less than expressly.

As regards the claim for interest after 1908 (*i e.*, after the expiry of four years from the date when the term of the mortgage-deed of the 10th of August 1904 came to an end) the ruling of their Lordships of the Privy Council in *I. L. R. 19 All. page 39 (1)* is sufficient authority for holding that the Court is entitled to award interest by way of compensation for damages for at least six years after the termination of the term of the mortgage, and this at such rate as the Court may think reasonable. In the present case we consider the rate agreed upon between the guardian and the mortgagee, *viz.*, 9 per cent. per annum, both reasonable and equitable. As a result of our conclusions upon the above points the appeal must fail and is hereby dismissed with costs.

Mr. Bahadur Chaud, on behalf of the respondents, filed a cross-objection to the effect that the decree was not drawn up according to law and he explained that the decree should have been in the form set forth in Appendix D of the First Schedule of the Civil Procedure Code, No. 4. As a matter of fact this objection was filed sometime before respondents received notice of the appeal and is not strictly a cross-objection of the kind contemplated by the Civil Procedure Code. The object which the respondents have in view is not so much to have the decree put in a proper form but to give them the right to claim interest not merely up to the date of judgment of the Lower Court (as ordered by that Court) but up to the date of realisation of their money. This further relief, claimed in this indirect way, we cannot allow. The respondents if they wished for such further relief should have either applied to the Subordinate Judge to amend his decree or should have appealed to this Court in respect of any additional interest to which they may be entitled.

We accordingly overrule the objection and direct that the decree of the Subordinate Judge stand as framed by him.

Appeal dismissed.

(1) (1896) *I. L. R. 19 All. 39 (P. C.)* (*Mathura Das v. Raja Narindar Bahadur*).

No. 25.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Leslie Jones.

SOHAN LAL AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

SARDAR KHAN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1099 of 1911.

Court-fee on appeal in suit for land where value of part of the subject matter in appeal exceeds the value of the whole.

The plaintiff as nearest reversioner of S. K. and N. K., deceased, sued after the death of their respective widows to contest certain sales and mortgages effected by the widows. Part of the area included in one of the sales made in 1878 had been planted by the alienee with a wood and an orchard and the defendants pleaded that even if their sale was set aside they were still entitled to receive from the plaintiff a sum of Rs. 10,000 as the value of these improvements. Their right to the value of improvements was not contested but the value was disputed and fixed by the lower Court at Rs. 2,880. The defendants-appellants in their appeal urged *inter alia* that even if the sales were set aside they ought to be allowed a further sum of Rs. 5,000. Their Memo. of appeal however bore Court-fees only to cover the value of the land in suit which was less than Rs. 5,000.

Held, that in cases where the whole subject matter of the suit is also the subject of the appeal, as in this case, the principle enunciated in 92 P. R. 1900 (1) is correct, *viz.*, "that it was not contemplated by the legislature that the Court fee payable on part of a whole claim in appeal is in the absence of express direction to the contrary to exceed the Court fee payable on the whole claim" and that consequently the Court fee on the present appeal was sufficient.

I. L. R. 36 All. 322 (2), followed.

71 P. R. 1911 (3) and 76 P. R. 1913 (4), discussed.

19 P. R. 1908 (F. B.) (5), referred to.

First appeal from the decree of Mirza Zafar-Uliak Khan, District Judge, Sialkot, dated the 12th October 1911.

Nanak Chand and Moti Sagar, for Appellants.

Badr-ud-Din, for Respondents.

The Judgment of the Court was delivered by—

* LESLIE JONES, J. * * * * * It is 18th Oct. 1915
here necessary to deal with another preliminary objection. Part of the area included in the sales of 1878 has been planted by the alienees with a wood and an orchard. The defendants pleaded that even if their sales were set aside they were still

(1) 92 P. R. 1900 (*Hazari Singh v. Piran*).

(2) (1911) *I. L. R. 36 All. 322* (*Haidari Begam v. Gulzar Bano*).

(3) 71 P. R. 1911 (*Sirdar Kirpal Singh v. Sant Singh*).

(4) 76 P. R. 1913 (*Waryam Singh v. Mahtab Singh*).

(5) 19 P. R. 1908 (F. B.) (*Abdur Rahman v. Charag Din*).

entitled to receive from the plaintiff a sum of Rs. 10,000 as the value of those improvements. Their right to the value of improvements was not contested, but their value was disputed and was fixed by the lower Court at Rs. 2,880 only. The defendant-appellants no longer claim Rs. 10,000 but urge that even if the sales are set aside they ought to be allowed a further sum of Rs. 5,000.

Counsel for the plaintiff-respondent then raised the objection, citing 71 *P. R.* 1911 (1), that if the defendant-appellants claim this additional sum of Rs. 5,000 they ought to pay the full Court-fee on that amount, which is greater than the Court-fee which they have paid on the whole subject matter of the appeal.

In reply counsel for the defendant-appellants has cited 76 *P. R.* 1913 (2), 92 *P. R.* 1900 (3), *I. L. R.* 36 *All.* 322 (4), and 19 *P. R.* 1908 (5). We are unable to see how the contention of the plaintiff-respondent is supported by 71 *P. R.* 1911 (1). In that case the plaintiff had got a decree for the recovery of the principal and interest due on a bond. The defendant on appeal claimed that the amount of the decree should be reduced and he was naturally required to pay the Court-fee on the exact amount of the relief which he claimed. Of the rulings cited for the defendant-appellants none is exactly in point. 92 *P. R.* 1900 (3) related to an appeal in a suit for pre-emption by the vendee for a sum which had been disallowed out of the price stated in the deed of sale. The Court-fee was paid only on the value of the land in suit. In the judgment it was remarked that "it was not contemplated by the legislature that "the Court-fee payable on part of a whole claim in appeal is, "in the absence of express direction to the contrary, to exceed "the Court-fee payable on the whole claim." This decision was criticised in 76 *P. R.* 1913 (2), on the ground that it proceeded "on the assumption that section 7, clause (vi), of the Court "Fees Act was applicable to appeals in pre-emption suits, and "upon grounds which, however specially plausible, apparently "overlooked the express terms of article I of the schedule "which alone regulate matters connected with the fee to be "paid upon Memorandum of appeal in such suits."

That criticism may be well founded for this reason that the appellant in 92 *P. R.* 1900 (3) did not appeal with the

(1) 71 *P. R.* 1911 (*Sirdar Kirpal Singh v. Sant Singh*).

(2) 76 *P. R.* 1913 (*Waryam Singh v. Mahtab Singh*).

(3) 92 *P. R.* 1900 (*Hazari Singh v. Piran*).

(4) (1914) *I. L. R.* 36 *All.* 322 (*Haidari Begam v. Gulzar Bano*).

(5) 19 *P. R.* 1908 (*F. B.*) (*Abdur Rahman v. Charag Din*).

object of getting the whole decree set aside but merely as regards the price. In cases where, however, the whole subject-matter of the suit is also the subject of the appeal, as in this case, it seems to us that the principle enunciated in 92 P. R. 1900 (1) is perfectly correct and in that opinion we are fortified by *I. L. R. 36 All. 322* (2). That was a case in which the plaintiff obtained an unconditional decree for the possession of land against a widow. The widow appealed against the whole decree but also claimed that in any event the decree should be made conditional on the payment of a sum of Rs. 80,000 due to her as dower. The Court-fee on appeal was paid on the value of the land only and the plaintiff-respondent pretended that it should be paid on the sum of Rs. 80,000. His objection was disallowed. Tudball, J., remarking that "it seems to me impossible to hold that the amount or value of the subject-matter of this appeal is anything more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain."

We are of the opinion that in the present case the same principle should be applied and for this reason we disallow the objection.

[The remainder of the judgment is not required for the purpose of this report.—Ed.]

No. 26.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice LeRossignol.

ABDUL SAMAD—(PLAINTIFF)—APPELLANT,

Versus

MUNICIPAL COMMITTEE, DELHI AND SECRETARY
OF STATE FOR INDIA—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 592 of 1911.

Appeal—whether competent by agent—when principal has withdrawn from the contest.

The plaintiff sued the Municipal Committee of Delhi for certain reliefs in respect of certain land sold by the Committee to certain persons which had eventually been transferred to plaintiff. The Committee pleaded *inter alia* that they had sold the leases as trustees of the Crown and the Secretary of State then applied to be made a party to the suit, which was ordered accordingly. The first Court overruled the objections of both defendants and found in favour of plaintiff throughout and decreed

(1) 92 P. R. 1900 (*Hazari Singh v. Piran*).

(2) (1914) *I. L. R. 36 All. 322* (*Haidari Begam v. Gulzar Bano*).

accordingly. From this decree the *Committee alone* appealed and the Divisional Judge accepted the appeal and dismissed the plaintiff's claim.

Plaintiff then lodged a further appeal to the Chief Court.

Held, that on the pleadings of the Committee that they had only acted as agents of the Secretary of State, the Committee was not competent to contest the appeal to the Divisional Judge when the principal had withdrawn from the contest and that the first Court's decree in favour of plaintiff must consequently be restored.

*Further appeal from the decree of A. E. Martineau, Esquire,
Divisional Judge, Delhi, dated the 6th February 1911.*

Muhammad Shafi, for Appellant.

Moti Sagar, for Respondents.

The Judgment of the Court was delivered by—

13th Oct. 1915.

LE ROSSIGNOL, J.—This suit arose out of the refusal of the Municipal Committee, Delhi to sanction the proposed erection by the plaintiff of a building on a site, the lease of which had been sold by auction by the defendant Committee in 1892 to one Muhammad Ishak and had subsequently passed into the hands of the plaintiff.

The original pleas of the Committee were that they had sold the leases as trustees of the Crown, and that as no permanent building could be erected on *nazul* land, their refusal to grant plaintiff's application to build was justified.

Next, the Secretary of State applied to be made a party to the suit; his right to be impleaded was contested by the plaintiff and the matter was concluded by a decision of this Court, dated 30th June 1909, in which it was held that the Secretary of State was the beneficial owner and that the defendant Committee was merely a kind of agent or trustee for the management of this land which was admittedly *nazul*, and the Secretary of State should therefore be made a party to the suit.

Accordingly, the Secretary of State was impleaded and his impleadment was supported by the Municipal Committee.

The first Court found throughout against the defendants; it held that the pleas of the Crown were invalid, that the Municipal Committee in auctioning the leases had not exceeded its rights; further, with reference to a plea advanced by the defendant Committee only after the Secretary of State had been impleaded, it decided that in spite of section 36 of the Municipal Act of 1891, the contract was binding on the Committee.

It then decreed all the reliefs claimed by plaintiff except that the amount of damages payable by the Committee was

fixed at Rs. 175 instead of the Rs. 1,400 claimed, and gave costs against both defendants.

From this decree the Committee alone appealed and the learned Divisional Judge dismissed plaintiff's suit holding that the land in suit belonged to the Committee and that section 36 of the Municipal Act rendered the contract invalid.

Against this appellate decree the plaintiff has preferred this further appeal which in our opinion must succeed.

The Committee did not come into Court with the plea that they were the owners of the land, on the contrary they described themselves as mere trustees or agents on behalf of Government. It is the Committee and not the plaintiff who are on the horns of a dilemma. Had they described themselves as owners of the land, the Secretary of State would have had no *locus standi*, but they described the Secretary of State as the real owner, and the real owner acquiesced in the decree of the first Court.

How could the mere agent contest the appeal when his principal had withdrawn from the contest?

On the merits, the decision must be decidedly against the Committee. Their ground for their refusal to sanction the plaintiff's application was not any contravention of any bye law but their inability to sanction any building at all on the land in suit.

This was found by the first Court not to be the case against both defendants, and the injunction issued by the Court restraining the Committee from prohibiting building for the reason alleged was perfectly justified. The sum awarded as damages was by no means excessive and we refuse to interfere in that matter.

So far as we are able to understand the case, we think the Committee have been ill advised in their pleas, but on these pleas we do not doubt that plaintiff is entitled to the decree granted by the first Court; had the Committee urged that the land belonged to them, the result might well have been different.

We accordingly accept this appeal and restore the decree of the first Court with costs throughout.

Appeal accepted.

No. 27.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Chevis.*

TEK CHAND—(DEFENDANT)—APPELLANT,

Versus

SOMAN SINGH AND ANOTHER—(PLAINTIFFS)—AND
MUSSAMMAT ASA DEVI—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 1494 of 1913.

*Hindu Law—Aroras—alienation by widow—status of reversioners to
contest the same in presence of a daughter.*

Held, that the late husband's reversioners may sue for the usual
declaration in respect of an alienation effected by the widow notwithstanding
the existence of a daughter of the deceased.

149 P. R. 1908 (1), followed.

249 P. W. R. 1912 (F. B.) (2), distinguished.

*Second appeal from the decree of Rai Bahadur Bhagat Narain
Das, Ahluwalia, Divisional Judge, Shahpur, at Sargodha,
dated the 22nd April 1913.*

Sheo Narain and Bhagat Ram Puri, for Appellant.

Nihal Chand, for Respondents.

The Judgment of the Court was delivered by—

23rd Oct. 1915.

CHEVIS, J.—On 3rd April 1910 Mussammat Asa Devi
mortgaged $\frac{2}{3}$ rds of a house to Tek Chand for Rs. 1,350. The
plaintiffs, who are collaterals of the deceased husband of
Mussammat Asa Devi, sue for the usual declaration that the
alienation shall not affect their reversionary rights, and the
lower Courts having given them a decree the alienee appeals to
this Court.

* * * * *

The only other point urged is that the plaintiffs cannot
sue in the presence of Mussammat Asa Devi's daughter, and
here reliance is placed on 249 P. W. R. 1912 (2), a Full Bench
ruling passed as long ago as 1882. It is to be noted that this
ruling never appeared in the Punjab Record, though Full
Bench rulings are generally reported. There is a much later
ruling, 149 P. R. 1908 (1), the facts of which appear to be on
all fours with the present case, and we prefer to follow this
later ruling, though it is that of a Single Judge. We should

(1) 149 P. R. 1908 (*Kapuria v. Mangal*).

(2) 249 P. W. R. 1912 (F. B.) (*Barkat Ram v. Jagat Ram*).

ordinarily consider ourselves bound by a Full Bench decision, but in addition to the fact that the Full Bench ruling was, for some reason, never reported in the Punjab Record, we note that it was a case where the last male owner had left not only a widow and a daughter but also a daughter's son, so that the chance of the remote reversioner's ever succeeding was small indeed.

We uphold the decision of the lower Courts and dismiss this appeal with costs.

Appeal dismissed.

No. 28.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Chevis.*

KANHIA LAL—(DEFENDANT)—PETITIONER,

Versus

NARAIN SINGH AND OTHERS—(PLAINTIFFS)—MADAN
LAL AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Revision No. 133 of 1913.

Civil Procedure Code, Act V of 1908, schedule II, rule 16 (2)—appeal or revision from decrees on awards of arbitrators—when admissible.

Held, that under schedule II, rule 16 (2) of the Code of Civil Procedure no appeal lies from a decree purporting to follow an award of arbitrators except on the ground that it is not based on an award, that is in effect that the award is not a valid award but a nullity.

Held also, that the Chief Court can revise judgments or orders against which no appeal lies on the ground of material irregularity, e.g., suppose a Court passed a decree on an award without giving time for objections; but considering that the object of the law of arbitration is rapid finality, such a revisional power will be used very sparingly.

25 P. R. 1902 (P. C.) (1), 88 P. R. 1902 (F. B.) (2), 89 P. R. 1902 (F. B.) (3), 1 P. R. 1908 (F. B.) (4), 1 P. R. 1911 (5), I. L. R. 38 Mad. 256 (6), referred to.

114 P. L. R. 1914 (7) and 78 P. L. R. 1913 (8), distinguished.

25 Indian Cases 583 (9), disapproved.

Petition for revision of the decree of Lala Murari Lal Khosla,

District Judge, Delhi, dated the 14th December 1912.

Nand Lal and Moti Sagar, for Petitioner.

Dalip Singh, Bahadur Chand and Tek Chand, for Respondents.

(1) 25 P. R. 1902 (P. C.) (*Ghulam Jilani v. Muhammad Hassan*).

(2) 88 P. R. 1902 (F. B.) (*Hansraj v. Ganga Ram*).

(3) 89 P. R. 1902 (F. B.) (*Panna Lal v. Mussamat Soman*).

(4) 1 P. R. 1908 (F. B.) (*Shankar Mal v. Nathu Mal*).

(5) 1 P. R. 1911 (*Ganesh Lal v. Beni Parshad*).

(6) (1913) I. L. R. 38 Mad. 256 (*Batcha Sahib v. Abdul Gunny*).

(7) 111 P. L. R. 1914 (*Kanwar Ranzor Singh v. Gyan*).

(8) 78 P. L. R. 1913 (*Gian Chand v. Behari Lal*).

(9) (1914) 25 Indian Cases 583 (*Nidamurthi v. Gargiparthi*).

27th Oct. 1915.

The Judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—This revision and the Civil Appeal No. 562 of 1913 are connected in the following way. The parties (to put the thing in the briefest possible way) had a mutual contract for the supply of *bajri*. Disputes arose, each party accusing the other of breach of contract. On 7th October 1911 Sardar Narain Singh, plaintiff in the revision case, sued Seth Kanhia Lal for damages to the amount of Rs. 14,000. On 9th February 1912 Kanhia Lal sued Narain Singh, Labh Singh and Nazir Mal for Rs. 7,059 4-0 price of *bajri* supplied, plus Rs. 13,490 damages, total Rs. 20,549-4-0. Then in the former case the whole matter was referred to arbitration, and on 30th October 1912 the award was put in, giving Narain Singh Rs. 11,782-5-0 and costs. Objections were heard and considered—see orders of lower Courts dated 22nd November and 14th December 1912—on which latter date a decree was passed in accordance with the award. Then on 24th December 1912 Kanhia Lal's suit for Rs. 20,549-4-0, which had by consent of counsel been kept in abeyance pending the result of the other suit, was taken up and was dismissed with costs on the ground that the issues in it were the same as those in the case decreed ten days earlier, that those issues had been disposed of finally, and that therefore this suit could not proceed.

On 22nd January 1913 Kanhia Lal put in his revision application, but for one reason or another it was not ripe for orders until 31st July 1914. Meantime Kanhia Lal had appealed in the other case (his own claim for Rs. 20,549-4-0), and that appeal had been admitted to a Division Bench on 21st April 1913. The revision petition, though plainly open to some objections, was allowed to be set down for regular hearing along with the appeal.

We have now heard both cases argued and have arrived at the conclusion that both the revision and the appeal should be rejected.

Mr. Tek Chand, for Narain Singh urges that no revision lies. Mr. Moti Sagar for Kanhia Lal contests this and takes his stand upon each and every paragraph of his revision petition. Both sides have quoted authorities, which we will notice presently. In our opinion it cannot be said absolutely that no revision lies. In our opinion the law is as follows. This decree (of 14th December 1912) is based or purports to be based, on an award and is certainly in accordance with that award. Therefore under Civil Procedure Code, no appeal

lies against it, except on the ground that it is not based on an award; that is, in effect, that the award is not a valid award but a nullity. Then this Court *can* revise judgments or orders, *against which no appeal lies*, on the ground of material irregularity committed by the Court passing the order or judgment; *e.g.*, suppose a Court passed a decree on an award without giving time for objections. But, considering that the whole object of the law of arbitration is rapid finality, such a revisional jurisdiction will be used very sparingly.

In arriving at the above propositions we have studied the well known rulings 25 *P. R.* 1902 (*P. C.*) (1), 88 (2) and 89 *P. R.* 1902 (*F. B.*) (3), 1 *P. R.* 1908 (*F. B.*) (4), 1 *P. R.* 1911 (5), *I. L. R.* 38 *Mad* 256 (6), and others. It is not necessary to state at length the facts and *dicta* in these rulings here. As to certain other rulings quoted by Mr. Moti Sagar, we need only say that in 114 *P. L. R.* 1914 (7) (a Single Bench case) the Judge did not positively hold that revision lay, but preferred to reject the petition on the ground that it was bad on the merits; and that in 78 *P. L. R.* 1913 (8) the Judge, dealing with a revision on the ground that all parties had not joined in the reference, should probably have refused to consider the revision, inasmuch as the question raised was one for appeal, but, overlooking this, considered the petition on the merits and dismissed it.

Mr. Tek Chand, on the other hand, cited* a Madras Single Judge case (25 *I. C.* 583) (9), in which it was held that neither appeal nor revision lay on the ground that there was no proper order appointing arbitrators. We are not inclined to follow that ruling: if there was no legal appointment of arbitrators, the award was a nullity and *appeal* would lie.

We will now take up the revision petition, clause by clause, and see to what extent, if any, it contains admissible grounds. Paragraph 1 in effect denounces the award as a nullity!; being ground for appeal we cannot hear it argued in revision. Paragraph 2 would probably be a good ground if correct in fact, but it is based on a misconception of fact, for there *was* a formal order passed extending time to 30th October

(1) 25 *P. R.* 1902 (*P. C.*) (*Ghulam Jilani v. Muhammad Hassan*).

(2) 88 *P. R.* 1902 (*F. B.*) (*Hansraj v. Ganga Ram*).

(3) 89 *P. R.* 1902 (*F. B.*) (*Panna Lal v. Mussammat Somn*).

(4) 1 *P. R.* 1908 (*F. B.*) (*Shankar Mal v. Nathu Mal*).

(5) 1 *P. R.* 1911 (*Ganeshi Lal v. Beni Parshad*).

(6) (1913) *I. L. R.* 38 *Mad*. 256 (*Batcha Sahib v. Abdul Gunny*).

(7) 114 *P. L. R.* 1914 (*Kanwar Ranzor Singh v. Gajan*).

(8) 78 *P. L. R.* 1913 (*Gian Chand v. Behari Lal*).

(9) (1914) 25 *Indian Cases* 583 (*Nidamurthi v. Gargiparthi*).

1912. Paragraph 3 takes up a matter fully considered and adjudicated upon by the lower Court in its order of 22nd November 1912. Therefore in this connection the lower Court was guilty of no irregularity whatever, and the paragraph is out of place in a revision petition.

Ground 4 is in argument utilised to urge that the lower Court should have remitted the award for reconsideration because (a) Nazir Mal's interest in the contract was dealt with in it, though he did not join in the reference, (b) the arbitrators failed to consider that there had been an award already in the case by one Damodar Das and that therefore they should decline to adjudicate afresh. As to (a) all we need say is that the arbitrators were obliged to decide whether Nazir Mal had an interest, as it had been asserted that he had; and that they decided he had none. As to (b) it is difficult to see what right petitioner has, after joining in this arbitration and leaving the whole dispute to be decided by the arbitrators, to say that those very arbitrators should have declined to arbitrate.

Ground 5 was fully dealt with by the lower Court: no irregularity there. Ground 6 (a) and (b) were not touched upon in argument before us: we see nothing in them. Ground 6 (c) would be technically good ground for revision, if it really disclosed an irregularity, for it is concerned with the action of the lower Court, but we can see nothing objectionable in the Court's helping the arbitrators with advice and orders when they came to it in a difficulty. Lastly, ground 7 is obviously not good ground for revision.

For these reasons we dismiss this petition with costs.

Petition dismissed.

No. 29.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Chevis.*

ISA AND OTHERS—(PLAINTIFFS)—APPELLANTS,
Versus
SAMMAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2040 of 1913.

*Custom—Alienation—Gujars, tahsil Phillour, district Jullundur—
validity of gift of ancestral property by sonless proprietor to daughter and
daughter's son in presence of near collaterals—Riwaj-i-am.*

Held, that by custom among Gujars of *tahsil* Phillour in the Jullundur district a gift by a sonless proprietor of ancestral property to a daughter whose husband was a *khana-damad* and to a daughter's son whom he had appointed as his heir is valid in the presence of near collaterals.

67 P. R. 1901 (1), 2 P. R. 1910 (2) and 50 P. R. 1893 (F. B.) (3), distinguished.

*Second appeal from the decree of O. F. Lumsden, Esquire,
Divisional Judge, Jullundur Division, dated 14th July 1913.*

Lakshmi Narain, for Appellants.

Nand Lal, for Respondents.

The Judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—In this case four issues were 28th Oct. 1915. drawn by the first Court in whose judgment the facts and pleadings are fully set forth. The first of these issues is concerned with the question whether the land is ancestral. Before us both sides state that it is so. The second issue is on a fact, *viz.*, did Mussammat Saidi's *doli* remain in the house of her father? This question has been decided in the affirmative by both the lower Courts and in second appeal we cannot discuss it again. A similar remark applies to the third issue, *viz.*, whether Suleman was actually appointed as heir by defendant No. 1. In short, the only question that we really have to decide is that of custom in connection with which the learned Divisional Judge has given a certificate under section 40 (3) of the Act.

The first Court, in our opinion, has dealt with this issue of custom in a very judicious and complete manner. It has sufficiently explained what evidence was produced on both sides and has in an adequate manner discussed the value of that evidence. It has pointed out that each party produced six witnesses, but a very important distinction is this that, whereas the defendant's witnesses quote a large number of instances in support of the custom that a sonless Gujar of the Phillour *tahsil* can gift his property to his daughter and daughter's son, on the other hand the plaintiffs' six witnesses are unable to say anything more than this that such gifts are invalid citing no instances in support of their opinion.

It is unnecessary for us again to set forth in detail what the documentary evidence produced by the parties consists of. It is enough for us to say that we entirely agree with the Lower Appellate Court that Exh. D-2, a judgment pronounced

(1) 67 P. R. 1901 (*Muhammad Din v. Sadar Din*).

(2) 2 P. R. 1910 (*Nabia v. Mussammat Fatto*).

(3) 50 P. R. 1893 (F. B.) (*Ralia v. Budha*).

by Mr. Justice Robertson in this Court in August 1909 is of great importance. If it is correct, it concludes the question now before us, and we see no reason to suppose that it is not correct.

On the same side we are much impressed by Exh. D-3. It is no doubt not a judgment of this Court, but at the same time it is a very well reasoned order of the Divisional Judge, Jullundur, which fully supports the defendants' case. No appeal was preferred against that judgment and it may, therefore, be taken as a valuable precedent. In that judgment a large number of instances are carefully scrutinized. Exh. D 4 is too old a judgment to be of much value now. But in addition to these we have a large number of mutations showing that sonless Gujars have been alienating their lands to daughters and daughters' sons without any objection by the collaterals. Ordinarily mere mutations are not so valuable as a judicial decision in a contested case; but, in view of the fact that not a single instance has been adduced *per contra*, we think that a certain amount of weight may properly be allowed to these mutations.

As the first Court has pointed out, the plaintiffs besides their oral evidence rely solely upon the *Rivaj-i-am* and two judgments. Now, we have seen the extracts from the *Rivaj-i-am* on the record and we cannot find that they help either party. They simply state that in the Phillour *tahsil* daughters are excluded by collaterals in the matter of succession; there is nothing said about a gift to a daughter or about *khana-damadi*. It is obvious that such entries have no bearing on the present case. Turning to the two judgments relied on by the plaintiffs, the first is Exh. P-9 delivered on the 24th May 1912. We have seen it and we find that the learned Munsif's criticism of it is absolutely accurate. The donee there was a sister's son and the gift was supported on the ground that it was made in return for services rendered but the finding was that no services had been rendered. The distinction between that case and this is very clear. The next judgment, Exh. P-10, is still more completely beside the mark; in fact, so much so that we do not think it necessary to discuss it at all.

We would also refer to the three rulings quoted by the appellants' counsel, *viz*, 67 P. R. 1901 (1), 2 P. R. 1910 (2) and 50 P. R. 1893 F. B. (3). As to the last of these, no doubt the *onus* of proving that a daughter's son can be adopted does

(1) 67 P. R. 1901 (*Muhammad Din v. Sadar Din*).

(2) 2 P. R. 1910 (*Nabia v. Mussammât Fatte*).

(3) 50 P. R. 1893 (F. B.) (*Ralla v. Budha*).

generally lie upon the person saying the same; but here we are really concerned with a gift to daughters and the question of *khana-damadi*. This ruling therefore would not help the appellants. As to 67 P. R. 1901 (1), it is a Single Bench ruling relating to Kathana Gajars of Gujrat. The decision was based largely upon proof of actual practice obtaining in that tribe in the Gujrat district. The present case comes from Phillour in the Jullundur district, and therefore it is impossible, in the face of the evidence adduced by the respondents, to attach much importance to that ruling. As to 2 P. R. 1910 (2), the first remark to be made is that the case is from the Ludhiana district. Next, in that case the last male holder of the property made a will of a very peculiar kind to the effect that, when his infant daughter should marry, her husband should be considered as his *khana-damad* and that his property should go to that infant daughter. The Division Bench held that such a will was not competent in the presence of near collaterals. It is difficult to see how this can be held up as contrary to the decision of the lower Court in this case, in which the question is whether a sonless proprietor among Gujars of the Phillour *tahsil* has the power to gift his land to a daughter whose husband was undoubtedly *khana-damad* and to a daughter's son whom he had appointed as his heir.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

No. 30.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Chevis.*

DOST MUHAMMAD KHAN AND OTHERS—(DEFENDANTS)
—APPELLANTS,

Versus

DOST MUHAMMAD KHAN—(PLAINTIFF)—AND OTHERS
—RESPONDENTS.

Civil Appeal No. 2015 of 1913.

Indian Registration Act, XVI of 1908, section 48—preference of registered document over oral gift where possession is with mortgagees.

Held, that an oral gift of land which is in possession of mortgagees, and possession of which could consequently not be delivered to the donees, is of no avail as against a subsequent transfer effected by a registered document.

10 P. R. 1900 (3), referred to.

I. L. R. 9 Mad. 267 (1) and P. L. R. of 1900, p. 131 (5), distinguished.

(1) 67 P. R. 1901 (*Muhammad Din v. Sadar Din*).

(2) 2 P. R. 1910 (*Nabia v. Mussamat Fatto*).

(3) 10 P. R. 1900 (*Ram Das v. Sanwana Ram*).

(1) (1886) I. L. R. 9 Mad. 267 (*Palani v. Selambara*).

(5) P. L. R. 1900, p. 131 (*Shankar Das v. Ram Das*).

Second appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge of the Attock Division, dated the 14th day of August 1913.

Nanak Chand, for Appellants.

Bhagat Ram Puri, for Respondents.

The Judgment of the Court was delivered by—

28th Oct. 1915.

SIR DONALD JOHNSTONE, C. J.—On 27th June 1912, defendant caused the patwari of his village, Watta Khel, to enter up a mutation of his land, 789 *kanals* 9 *marlas*, which he said he was giving to his sons, defendants 2 to 4. Of that area some 234 *kanals* 14 *marlas* is in suit in the present case, being land already in mortgage to Gheba and Ahmad. The gift was oral. On 7th August 1912, defendant 1 executed and registered a of mortgage of 247 *kanals* 18 *marlas* in favour of plaintiffs for Rs. 3,416, part of the land being the 234 *kanals* 14 *marlas* referred to above. Defendants 2 to 4, relying on the aforesaid gift, contested plaintiff's right: hence this suit for possession of 247 *kanals* 18 *marlas*. Pleas were put in and issues framed, and the first Court found that the mortgage to plaintiffs was for consideration and "necessity," that plaintiffs were probably not aware of the gift to defendants 2 to 4, that section 48, Registration Act, operates to give plaintiff's mortgage-deed preference over the oral gift, which was not accompanied by delivery of possession, and that defendant 1's powers of alienation could not be controlled by defendants 2 to 4.

These defendants appealed, and the Lower Appellate Court upheld the first Court's judgment and decree, holding that defendant 1's powers of alienation were by custom unrestricted, and that the first Court's view as to the effect of section 48, Registration Act, was correct.

Their "second appeal" to this Court raises the question of custom again, the but in absence of a certificate under section 41 of the Courts Act we cannot allow this matter to be argued. It also raises other questions, of which, however, we need decide only that concerning the law of registration.

deed In our opinion the decision of the lower Courts on this point is clearly correct. Even taking it that the gift preceded the mortgage, the latter must be preferred. The former was an oral agreement or declaration within the meaning of section 48 of the Registration Act, and, the land in suit being in mortgage with possession to Gheba and Ahmad, possession of it could not be, and was not, delivered to defendants 2 to 4 before date of mortgage. Mr. Nanak Chand argues that in

the circumstances defendant 1 did all he could do in the way of delivering possession in June 1912; but this is insufficient. Possession was not delivered, see 10 *P. R.* 1900 (1), a case exactly in point.

The two rulings relied upon by Mr. Nanak Chand do not help him. In *I. L. R.* 9 *Mad.* 267 (2), possession was held to have been delivered because, the land being in cultivating possession of tenants, those tenants had been made to attorn to the alienees; and in *P. L. R.* of 1900, page 131 (3), the alienee under oral agreement had not only his agreement to rely upon but also a decree based on that agreement.

Ground 6 of appeal has not been touched upon and may be taken to have been abandoned.

For these reasons we dismiss this appeal with costs.

Appeal dismissed.

No 31.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
LeRossignol.*

MRS. STEWART—(DEFENDANT)—APPELLANT,

Versus

**BANK OF UPPER INDIA, LTD., SIMLA—(PLAINTIFF) —
RESPONDENT.**

Civil Appeal No. 1323 of 1911.

Mortgage—by deposit of title-deeds—effective in the Punjab as against subsequent mortgage by registered deed with or without notice—title-deeds include copies where originals were lost—presumption of intention to keep previous rights alive—Indian Registration Act, III of 1877, section 48—not applicable.

The plaintiff Bank sued to enforce their rights as mortgagees against the defendants 1 and 2, the mortgagors and the mortgaged property a house named "Chor View," under a registered mortgage-deed dated 12th November 1907—defendant 3 the present appellant was impleaded as she claimed to have a prior equitable mortgage on the house by deposit of title-deeds—plaintiff urged:—

(1) That the so-called title-deeds were in fact no title-deeds at all but merely attested copies of the original deeds and that as such their deposit could not create a mortgage in Mrs. Stewart's favour, and

(2) That it was never intended that the deposit should have the effect of a mortgage or charge upon the property.

Held, as to (1) that this plea could not be raised for the first time in appeal but also that title-deeds include "copies" of the deeds when the originals are not forthcoming.

Gour's Transfer of Property Act, (3rd edition), p. 715, citing *Ex-parte Broadbent*, 1 *M. and A.* p. 635 (1), referred to.

Held, as to (2) on the facts that the title-deeds were deposited with appellant with the intention of creating a mortgage-charge in her favour over the property in suit.

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- (1) 10 *P. R.* 1900 (*Ram Das v. Sanwana Ram*).
 (2) (1886) 1 *L. R.* 9 *Mad.* 267 (*Palani v. Selambara*).
 (3) *P. L. R.* 1900, p. 131 (*Shankar Das v. Ram Das*).
 (4) 1 *M. and A.*, p. 635 (*Ex-parte Broadbent*).

Also that in accepting a subsequent written mortgage the ordinary presumption would be that she intended to keep the first mortgage alive for all purposes beneficial to herself.

Held further, that in those parts of British India where the Transfer of Property Act, 1882, is not in force a valid mortgage can be created by deposit of title-deeds.

9 *Moo. I. A.* 307 (1), *I. L. R.* 17 *All.* 252 (260) per *Burkitt J.* (2), *I. L. R.* 14 *Bom.* 269 (3) and *Ghose's Law of Mortgage* (4th edition) p. 151 *et seq.*, referred to.

And there being no difference in this country between equitable and legal estates, that such a mortgage has as extensive an operation as a mortgage or charge created by a registered deed and consequently the question of notice, actual or constructive, of the previous mortgage by deposit of title-deeds, which exists in England, does not arise in the Punjab and section 48 of the Registration Act does not apply.

I. L. R. 31 *Cal.* 57 (72) (*P. C.*) (4), *I. L. R.* 11 *Cal.* 158 (5), *I. L. R.* 33 *Cal.* 410 (6), 14 *Burma L. R.* 211 (7), *Ghose's Law of Mortgages* (aforesaid) and *Shephard and Brown's Commentaries on "Transfer of Property Act"* (7th edition), p. 255, referred to.

First appeal from the decree of M. H. Harrison, Esquire, District Judge, Simla, dated the 16th August 1911.

Fazl i-Hussain, for Appellant.

B. Bevan Petman, for Respondent.

The Judgment of the Court was delivered by—

RATTIGAN, J.—In this, as in the connected case (Civil Appeal

4th Nov. 1915.

* Reported as No. No. 2438 of 1914,* the facts as proved or 32 on page 91 *infra* alleged, are simple. The plaintiff is the Bank of Upper India, Limited, and it sues to recover a sum of Rs. 7,471-1-6 on the basis of a registered mortgage-deed executed in its favour on the 12th November 1907 by the late Mr. Corstorphan and his widow, Mrs. Corstorphan (defendants No. 1 and No. 2), who is sued both as the legal representative of her late husband and in her own personal capacity. The plaint sets forth that the consideration for the said mortgage was a loan by the plaintiff Bank to the mortgagors of a sum of Rs. 6,000 payable on the 12th October 1910, and that it was agreed between the parties that interest at the rate of 8 per cent. per annum, with half-yearly rests, should be paid thereon on the 15th of each month from the 15th December 1907, and that in default of payment of interest as agreed, the whole amount, principal and interest, was to become due forthwith with interest at the rate of 10 per cent.

(1) (1862) 9 *Moo. I. A.* 307 (*Varden Seth Sam v. Luckpathy Royjee Lallah*).

(2) (1895) *I. L. R.* 17 *All.* 252 (260) (*Himalaya Bank, Ltd. v. Quarry*).

(3) (1889) *I. L. R.* 14 *Bom.* 269 (*Manekji Framji v. Rustomji Naserwanji*).

(4) (1903) *I. L. R.* 31 *Cal.* 57 (72) (*P. C.*) (*Webb v. Macpherson*).

(5) (1884) *I. L. R.* 11 *Cal.* 158 (*Coggan v. Pogose*).

(6) (1905) *I. L. R.* 33 *Cal.* 410 (*Gokul Dass v. Eastern Mortgage and Agency Coy*).

(7) 14 *Burma L. R.* 211 (*Pawewa v. Oar*).

per annum; that as security for the due payment of the amount secured by the mortgage, the mortgagors mortgaged to the plaintiff Bank the house known as "Chor View Cottage," situated in Kasumpti, Simla, together with all buildings, erections, furniture, fixtures, goods and chattels thereon and also all the rents, profits and income of the said house; and that defendant No. 3 (Mrs. Stewart) was impleaded as a defendant because she claimed to be "a puisne mortgagee" of the said mortgaged property. Plaintiff Bank accordingly prayed for a decree for payment by defendants Nos. 1 and 2 (*i. e.*, Mrs. Corstorphan in her dual capacity) of the sum of Rs. 7,471-1-6 with costs of the suit and future interest at 10 per cent. per annum and that it might further be decreed that in default the property mortgaged should be sold and if the amount due to plaintiff was not satisfied thereby, the balance should be recoverable from the other property of the said defendants.

Mrs. Corstorphan confessed judgment and admitted execution of the said mortgage-deed and receipt of full consideration.

Mrs. Stewart, defendant No. 3, through her counsel, filed a lengthy written statement in reply to the plaint to which objection was taken in numerous respects, and as a result of her pleading no less than one preliminary and ten main issues were framed by the Court.

Upon these issues the District Judge found as follows:—

(1) *Preliminary Issue*: that the present suit was not barred by reason of the previous suit, No. 163 of 1910;

(2) *Issue 5*: that the present suit was not barred merely because plaintiff Bank did not enforce the forfeiture clause which came into operation on the 15th December 1907;

(3) *Issue 8*: that the question of the priority of defendant No. 3's mortgage over the mortgage-deed upon which the present suit was based was *res judicata* by reason of the decision in the said former suit between the parties (No. 163 of 1910);

(4) *Issue 3*: that defendant No. 3 had failed to prove that defendants 1 and 2 had not received full consideration for the mortgage in favour of the plaintiff Bank;

(5) *Issue 6*: that the plaint was not bad for vagueness;

(6) *Issue 9*: that, except as regards a sum of Rs. 500 which should have been claimed as costs, the amount claimed by plaintiff Bank was correct;

(7) *Issue 4*: that in lieu of the rate of interest claimed by plaintiff Bank (*viz.* 8 per cent. per annum *plus* 2 per cent.

per annum in case of default) plaintiff Bank was entitled, as reasonable compensation, to claim only 9 per cent. per annum;

(S) *Issues 1, 2, 7 and 10*: that Mrs. Stewart had proved that she held an equitable mortgage, through deposit of title-deeds, over the "Chor View" estate; that there had been no subrogation of the prior mortgage to the Punjab Banking Company in her favour; that since 1907 the plaintiff Bank held a legal mortgage upon the said property; that the plaintiff Bank had no knowledge or notice of Mrs. Stewart's equitable mortgage until after the death of Mr. Corstorphan which occurred in February 1910, shortly after the execution of the registered deed of mortgage in her favour; and that consequently plaintiff Bank had a first charge on the property in suit.

The learned Judge as a result of his findings on the above issues, held that the sum of Rs. 6,919-9-6 was due as a first charge to the plaintiff Bank, and that Mrs. Stewart had a second charge, as mortgagee, upon the property in suit to the extent of Rs. 15,603-11-0. He granted a decree accordingly in form 6, appendix D, of the Civil Procedure Code.

Mrs. Stewart, defendant No. 3, has preferred an appeal from the decree of the District Judge to this Court, and we have heard the case argued at length by Mr. Fazl-i-Hussain on her behalf and by Mr. Bevan Petman for the respondent Bank.

It will clear the ground if we here note that the only points argued before us by the learned counsel above mentioned were (1) whether Mrs. Stewart had the rights of a mortgagee over the property in suit prior to the execution of the registered deed of the 8th February 1910 (D. 3) (1); (2) whether she was entitled to claim a subrogation of the earlier mortgage in favour of the Punjab Banking Company on the allegation that that mortgage had been paid off out of the money lent by her to the mortgagor, Mr. Corstorphan; (3) whether the plaintiff Bank in December 1907, when the mortgage-deed now sued upon was executed, had actual or constructive notice of the earlier (alleged) mortgage in favour of defendant No. 3, and if so whether the fact of such notice deprived the plaintiff Bank of the priority which it might otherwise have had; and (4) whether the alleged mortgage by deposit of title deeds was merged in the subsequent registered deed of February 1910 and defendant No. 3 thus deprived by operation of law of any priority which she might otherwise have claimed.

In other words, Mr. Fazl-i-Hussain gave up all the pleas advanced by his client in her written statement except those set forth in paragraphs 8 and 9 thereof, while Mr. Bevan Petman did not attempt to support the judgment of the

District Judge on the ground that the questions now in issue between the parties were *res judicata* by reason of the decision in the former suit. We have no doubt that counsel were well advised in adopting this course. The other pleas urged by defendant No. 3 in her written statement were futile and we are surprised that they were ever advanced, while the conclusion arrived at by the District Judge on issue 8 is so clearly wrong that Mr. Bevan Petman was right in not referring to it.

The first question, then, with which we have to deal on this appeal is whether prior to December 1907 there was in fact and in law a mortgage upon the property in suit (the Chor View estate) in favour of Mrs. Stewart. It has been found by the District Judge in this case and by the Courts in the former case that Mr. and Mrs. Corstorphane did actually deposit certain documents relating to the said estate and described as title-deeds with Mrs. Stewart; that this deposit was intended to be a security to her for the moneys which she had advanced from time to time to Mr. and Mrs. Corstorphane; and that as a result Mrs. Stewart held an *equitable* mortgage over the said estate which was prior in time to the mortgage upon which the plaintiff Bank bases its present claim. On behalf of the respondent Bank, Mr. Bevan Petman contests the correctness of this finding and contends (1) that the so-called title-deeds were in fact no title-deeds at all but merely attested copies of the original deeds, and that as such their deposit could not create a mortgage in Mrs. Stewart's favour; and (2) that Mr. and Mrs. Corstorphane never intended the deposit to have the effect of a mortgage or charge upon the property.

As regards the first argument, Mr. Bevan Petman relied upon a passage in Gour's Transfer of Property Act (3rd edition, page 715) where the learned author, citing *ex-parte Broadbent* (1 M. and A., page 635) (1), states that for the purposes of creating a mortgage or charge by deposit, the copy of a title-deed cannot take the place of the original. We do not think it is open to Mr. Petman to raise this plea for the first time in appeal before us, as the so-called title-deeds have hitherto been received, without demur, as regular title-deeds both by the parties and also by the Punjab Banking Company (the original mortgagees) and by all the Courts before whom the documents have been produced. The deeds in question were executed many years ago and there is every reason to believe that the originals have been lost, a fact which could no doubt have been established had the present objection been taken at the trial of the suit. And in this connection we

(1) 1 M. and A., p. 635 (*ex-parte Broadbent*).

would refer to a later passage in Gour's work where, citing the same authority as that above mentioned, he observes that "title-deeds include copies of the deeds when the originals are "not forthcoming." We accordingly hold that this objection cannot be entertained at this stage of the case.

As regards the second point, we see no reason to differ from the finding of the District Judge. It is abundantly proved, and indeed is not denied, that Mrs. Stewart at various periods between November 1904 and May 1906 lent Mr. and Mrs. Corstorphan sums of money, aggregating in all to a sum of Rs. 23,000, and we have every reason to believe, as found by the District Judge, that it was out of this money that Mr. Corstorphan paid off the debt of Rs. 12,000 due from him to the Punjab Banking Company in or about June 1905. He then handed over to Mrs. Stewart the title-deeds to the property in suit and that it was the intention both of himself and of Mrs. Stewart that this deposit should create a mortgage upon that property is evident from his letters which are on the record (see Exhibits D. 3 (25), (31), (35), (38), (39), (49) and the two wills executed by Mr. and Mrs. Corstorphan, Exhibits D. 3 (63), (64), and from the evidence of Mrs. Stewart (page 92 of the paper book) which stands uncontradicted. We have no hesitation, therefore, in agreeing with the District Judge that the title-deeds were deposited with Mrs. Stewart with the intention of creating a mortgage charge in her favour over the property in suit.

The argument based on the doctrine of merger, that Mrs. Stewart's acceptance of the registered deed of 8th February 1910 operated by law as an extinguishment of any rights which she might have had by reason of her earlier mortgage, was not urged in the Court below and is put forward for the first time in appeal before us. In these circumstances we decline to entertain it, more especially as there is nothing on the record to show that Mrs. Stewart had any intention when she accepted the later deed to give up valuable rights which accrued to her under the earlier transaction. The ordinary presumption in a case such as this would be that she intended to keep the first mortgage alive for all purposes beneficial to herself.

In the view that we take of the legal rights of the parties, we find it unnecessary to discuss the question of subrogation, and we pass on to the final point, namely, whether it was necessary for Mrs. Stewart to prove that the Bank, when it took its mortgage in 1907, had notice, actual or constructive, of the earlier mortgage in her favour.

In those parts of British India where the Transfer of Property Act, 1882, is not in force, there can be no doubt that

a perfectly valid mortgage can be created by deposit of title-deeds (see *Varden Seth Sam v. Luckpathy Royjee Lallah, etc.* 9 M. I. A. 307 (1); *Burkit J. in I. L. R. 17 All.* page 260 (2); *I. L. R. 14 Bom.* 269 (3); Ghose's Law of Mortgage, 4th edition, page 151, *et seq.*). In England a mortgage of this kind is regarded more as an agreement to make a formal mortgage than as an actual mortgage in itself, and it is on this ground that it is known there as an "equitable" mortgage and does not operate as an actual conveyance. As a result of that doctrine a subsequent mortgagee who obtains what is known in England as the "legal" estate, obtains priority over the prior mortgagee on the ground that where the equities are equal, the law shall prevail. And it is only in those cases where the legal mortgagee can be proved to have had notice, actual or constructive, of the earlier equitable mortgage that he loses his rights of priority.

In this country, as pointed out by their Lordships of the Privy Council in *I. L. R. 31 Cal.* page 72 (4), there is no distinction between equitable and legal estates, and as a result, if it be once conceded as we think it must be, that a deposit of title-deeds, if not forbidden by law, is a lawful mode of creating a mortgage or charge, we see no reason why it should not have as extensive an operation as a mortgage or charge created by a registered deed. As pointed out by Ghose in his work, to which we have referred above: "In England a mortgage by deposit of title-deeds is known as an equitable mortgage, because it does not operate as an actual conveyance; but in our law a deposit of title-deeds to secure a loan constitutes an actual mortgage and not merely an agreement to create a mortgage. To speak, therefore, of such a mortgage as an equitable mortgage is to confound the distinction between an actual conveyance and a mere contract to convey and is likely to encourage the notion that a creditor whose debt is secured by a mortgage duly executed is in the same position as a mortgagee in England, who has obtained the legal estate without notice of a prior equitable encumbrance. A mortgage by deposit of title-deeds is not available in England against a *bona fide* purchaser for value of the legal estate; because such a mortgage is treated as a mere equitable security.

"This preference of the legal estate is rested by English lawyers on the maxim that where the equities are equal the

(1) (1862) 9 Moo. I. A. 307 (*Varden Seth Sam v. Luckpathy Royjee Lallah*).

(2) (1895) *I. L. R.* 17 All. 252 (260) (*Himalaya Bank, Ltd., v. Quarry*).

(3) (1889) *I. L. R.* 14 Bom. 269 (*Manekji Framji v. Rustomji Nasrwanji*).

(4) (1903) *I. L. R.* 31 Cal. 57 (72) (*P. C.*) (*Webb v. Macpherson*).

“law shall prevail. It is, however, doubtful whether in this particular case it is necessary to resort to any such artificial rule, as a distinction is recognized in every system of jurisprudence between a real and a contractual right. You may, if you like, call the one a legal and the other an equitable estate. But we must remember that the distinction owes its origin to a mere accident and has been preserved in England up to the present time only by the piety of her lawyers.”

In Shephard and Brown's Commentaries on Transfer of Property Act, 7th Edition, page 255, it is stated that “a mortgage by deposit of deeds is a complete act and not an executory agreement and therefore section 48 of the Registration Act which gives priority to registered instruments as against oral agreements not followed by delivery of possession of the property concerned, does not apply. The mortgage by deposit of title-deeds prevails against the subsequent transferee who takes under a registered instrument.” To a similar effect are the decisions of the High Court of Calcutta in *I. L. R. 11 Cal. 153* (1) and *33 Cal. 410* (2). In the two cases last cited and in *Paewea v. Oar*, 14 *Burma L. R.*, page 211 (3), it was held that a deposit of title deeds which creates a mortgage is not an oral agreement within the meaning and for the purposes of section 48 of the Indian Registration Act, and that as a consequence a registered deed relating to the same property and executed at a later date does not take precedence over the earlier transaction by virtue of the provisions of that section. The result then appears to be that in the Punjab and in other places where the Transfer of Property Act does not obtain, a mortgage by deposit of title-deeds is a valid legal mortgage and has the same legal effect as a mortgage created by any other means recognized by law; that the English doctrine of the legal estate prevailing over the equitable estate does not obtain in a country where there is no distinction between legal and equitable estates; and that consequently a mortgagee, who holds a registered deed of mortgage, cannot claim priority over an earlier mortgage created by deposit of title-deeds. In this view it is unnecessary for us to discuss the question whether the plaintiff Bank had any notice of the earlier mortgage in favour of Mrs. Stewart or whether the Bank by the exercise of ordinary care and caution could have obtained notice or knowledge of that transaction. For the reasons given we hold that the mortgage of November

(1) (1884) *I. L. R. 11 Cal. 153* (*Coggan v. Pogose*).

(2) (1905) *I. L. R. 33 Cal. 410* (*Gokul Dass v. Eastern Mortgage and Agency Coy.*).

(3) 14 *Burma L. R.* 211 (*Paewea v. Oar*).

1907 in favour of the plaintiff Bank has no priority over the mortgage created in favour of Mrs. Stewart. At the same time there is a provision in the registered deed which was executed in February 1910 in favour of Mrs. Stewart to the effect that her mortgage should be subject to an earlier mortgage in favour of the plaintiff Bank for Rs. 3,000. The mortgage here referred to is not the one upon which the suit is based though it forms part of the consideration for the latter, but we consider, and Mr. Fazl-i-Hussain conceded, that the plaintiff Bank is certainly entitled to priority to the extent of the money secured thereby.

We accordingly accept this appeal and in lieu of the decree passed by the Court below, we grant plaintiff a decree limited (as regards priority of payment) to the amount of Rs. 3,000 and interest thereon at the rate of 8 per cent. per annum from the 22nd July 1906 (the date of the said earlier mortgage) up to the date of suit.

We leave the parties to bear their own costs throughout.

Appeal accepted.

No. 32.

Before Hon. Mr. Justice Rattigan, and

Hon. Mr. Justice LeRossignol.

MRS. STEWART—(DEFENDANT)—APPELLANT,

Versus

BANK OF UPPER INDIA, LTD.—(PLAINTIFF)—AND

OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 2438 of 1914.

Mortgage—hypothec—oral charge on moveable property in Punjab effective as against subsequent written mortgage.

The plaintiff Bank sued to enforce their claim on an unregistered deed of mortgage of the machines, types, plants, printing presses, printing materials, apparatus, &c., also the good will, furniture, fixtures, fittings and appurtenances, &c., belonging to a press. The Defendant-Appellant relied on a previous oral charge or *hypothec* of these properties made in her favour to secure advances made by her.

Held, that in the Punjab a charge of this kind in respect of moveable property could be made without any deed in writing and if made orally it was as effectual (except in cases provided for by section 48 of the Indian Registration Act) as if it were effected by an instrument in writing.

Held consequently, that the defendant's oral charge being prior in time must prevail over the rights of the plaintiff Bank under its written deed and that the question of notice did not arise.

11 *Indian Cases* 869 (1), referred to.

(1) (1911) 11 *Indian Cases* 869 (*Abdur Rahman v. Kishna Mal*).

*Second appeal from the decree of Lieutenant-Colonel G. C. Beadon,
Divisional Judge, Ambala, dated the 26th May 1911.*

Fazl-i-Hussain, for Appellant.

B. Bevan Petman, for Respondents.

The Judgment of the Court was delivered by—

5th Nov. 1915.

RATTIGAN, J.—This is in reality a very simple case and we have no doubt would have presented no difficulty to the Courts below had it not been for the extraordinary prolixity, futility and irrelevancy of most of the pleas urged on behalf of defendant No. 3 (Mrs. Stewart) in the Court of the District Judge and to the argumentative verbiage of the 33 grounds of appeal filed on her behalf in the Court of the Divisional Judge on appeal. The real question at issue between the parties was, unfortunately for this defendant, entirely obscured as a result of these pleas—the majority of which were so obviously untenable that we are not surprised that no reference has been made to them in the argument before us, and the dispute between plaintiff and defendant No. 3 has been decided on points which are really irrelevant. For this very unfortunate result the blame rests not with the Courts which dealt with the case as presented before them, but with the defendant and her legal adviser who would seem to have gone out of their way to hide from the Courts the only, but, as we shall presently show, the very effective answer that they have to plaintiff's claim.

Briefly stated, the plaintiff Bank claims to recover a sum of Rs. 2,167 from the estate of the late Mr. George Corstorphan and bases its claim on a promissory note and an unregistered deed of mortgage (P-1 and P-2, both dated 10th of July 1909). This mortgage deed will be found printed at page 12 of the Paper book in First Appeal No. 1323 of 1911 (1) and under its terms Mr. and Mrs. Corstorphan for a consideration of Rs. 2,000 mortgaged, granted and assigned to the plaintiff Bank "all "our press and the relative business run under the name and "style of the 'Simla Times Press at Simla' together with "all and singular the machines, types, plants, printing presses, "printing materials and apparatus, &c., as also the good will, "furniture, fixtures, fittings and appurtenances," &c., &c. Admittedly the Punjab Banking Company had a much earlier mortgage on this same property and that mortgage was paid off by Mr. Corstorphan who borrowed money from defendant No. 3 for the purpose of redeeming his property. It is alleged, and there is nothing on the record to the contrary, that this mortgage was paid off in June 1905. Defendant No. 3 states that on redemption of the Punjab Banking Company's mort-

gage, Mr. Corstorphan handed her an inventory of the property now in suit and agreed with her that she should have a mortgage or charge upon the said property as part security for her loan to him which at that date amounted to about Rs. 22,000 (see exhibit D. 3 (25)). This plea is set forth in paragraphs 10 and 11 of her second written statement, and is amply substantiated by the letters addressed to her by Mr. Corstorphan which are marked (in the supplementary Paper book) as D. 3 (31); D. 3 (35); D. 3 (39) and D. 3 (49). In the first of these letters dated 28th January 1906 Mr. Corstorphan writes as follows:—"Bond or no bond, your positions are " perfectly safe. We owe you Rs. 22,000 and everything we " possess is pledged to you for its repayment " In the second letter dated 16th February 1907 he writes:—The value I put on the properties mortgaged to you are as follows:—

* * * * *

" Press Rs. 16,000."

In the same letter, later on, he refers to a suggestion that he should pay Mrs. Stewart Rs. 4,000, and that in consideration thereof, she should "relieve" him "of a claim on the press "for the first mortgage," and take in lieu thereof "a second mortgage on the press."

In D. 3 (49) he tells her again, "you have, of course, your "claim on the press." And finally, in recognition of Mrs. Stewart's right to the press, both he and his wife, by their wills, dated 13th May 1906, give and bequeath (*inter alia*) the Simla Times Printing Press and all its appurtenances to this lady.

In face of all this documentary evidence it is impossible to hold that Mr. and Mrs. Corstorphan did not create a charge or hypothec upon the property now in suit in favour of Mrs. Stewart, and this quite apart from the contention that by handing over to her the inventory of the said property, Mr. Corstorphan created an equitable mortgage thereupon in her favour. The documents to which we have referred bear various dates in 1906 and 1907 and they clearly refer to an oral anterior agreement by which such charge or hypothec was created. They are all prior in time to the pro-note and unregistered mortgage upon which the plaintiff Bank relies and which bear date 10th July 1907.

Upon these facts how can it be contended that plaintiff's unregistered mortgage deed and pro-note are entitled, though later in date, to priority over the charge possessed by Mrs. Stewart. We know of no provision of law in force in this Province which requires a charge of this kind in respect of

moveable property to be by deed in writing; nor is there any authority for the proposition that if made orally it is not as effectual for all purposes (except, of course, in the cases provided for by section 48 of the Indian Registration Act) as if it were effected by an instrument in writing, provided always that its existence can be proved. In the case before us section 48 of the Registration Act has no applicability and the existence of the charge has, in our opinion, been established beyond all possibility of doubt. Plaintiff Bank has not in its pleas contended nor was it put in issue that Mrs. Stewart by any act on her part had forfeited this right of priority, though Mr. Bevan Petman on behalf of the Bank suggested before us that by taking a registered deed in 1910, Mrs. Stewart had, by operation of law, had the misfortune to lose any rights of priority which she might otherwise have had, inasmuch as the oral agreement to create a hypothec in her favour was merged in the higher security of the registered deed. As we have remarked, this argument was not put forward in either of the Courts below and it is too late to urge it at this stage. But apart from that objection, we are entitled to assume that it was not Mrs. Stewart's intention, when she obtained the registered deed, to forego valuable rights which she had in law under the earlier agreement with Mr. Corstorphan. On the contrary, as it was obviously to her benefit to keep the earlier charge alive, she must be presumed to have taken the registered deed subject to that condition.

We hold, accordingly, that the hypothec created by Mr. and Mrs. Corstorphan in favour of Mrs. Stewart over the property in suit gave her as much right to that property as the unregistered deed of mortgage subsequently executed gave to the plaintiff Bank and that quite irrespectively of all questions of notice, her rights being prior in time must prevail over the rights of the latter (see as to this the ruling reported in No. 11 Indian Cases at page 869) (1).

As a result of this finding we must accept this appeal and amend the decree by declaring that the plaintiff Bank is entitled to realise the amount claimed in the plaint from the property mortgaged to it only after the claims of Mrs. Stewart against that property have been fully satisfied. Plaintiff Bank will pay Mrs. Stewart's costs throughout. Mrs. Corstorphan, defendant No. 2 put forward no defence and stated that she was a mere stakeholder who was ready to pay whomsoever of the two claimants was adjudged by the Court to be entitled to the money claimed.

Appeal accepted.

No. 33.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Chevis.

MUSSAMMAT PARTAPI—(PLAINTIFF)—APPELLANT,

Versus

HAZARA SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1013 of 1909.

*Custom—power of a female to contest alienation by another female—
Jat Sikhs of the Jullundur District.*

Held, that among the Jat Sikhs of the Jullundur District the *onus* of proving that a daughter has the right to contest an alienation by her mother of land, whereof the last male holder was her father, lies on the daughter and that on the record she has failed to discharge the *onus*.

5 P. R. 1895 (1), 19 P. R. 1906 (2), 72 P. R. 1906 (3), 60 P. R. 1910 (4), distinguished.

61 P. R. 1906 (5) and 13 P. R. 1912 (6), approved.

*Further appeal from the decree of M. L. Waring, Esquire,
Divisional Judge, Jullundur Division, dated the 12th July 1909.*

Sheo Narain and Sewaram Singh, for Appellant.

G. C. Narang, for Respondents.

The Judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—The orders of a Division ^{1st Nov. 1915.}
Bench of this Court of 8th and 10th November 1913 referring to a Full Court certain questions therein set forth give the facts of this case. We had two connected appeals before us, whereof one (No. 1014 of 1909) has been compromised and the other remains for decision, very much the same questions being involved in both cases. It is unnecessary for us to repeat what has already been written. Put briefly the first question we have to decide is whether plaintiff, daughter of Jaura and Mussammat Mano, has the power by custom to contest an alienation by the latter of the property formerly belonging to Jaura and his brother Jit, both deceased, the alienation being by will and in favour of the sons and grandson of another daughter. The question of *onus* is easily disposed of. The first Court—see issues 3 and 4—clearly laid upon defendants 3 to 6 the burden of proving that the will was valid and that plaintiffs had not the power to contest it, and it found on both points in favour of plaintiffs. The lower Appellate Court did not directly decide this question, but, taking up issue 2, found that Sundar Singh, father of defendants 3 to 6, was legally a

(1) 5 P. R. 1895 (*Sher Muhammad Khan v. Muhammad Khan*).

(2) 19 P. R. 1906 (*Chiragh Bibi v. Hassan*).

(3) 72 P. R. 1906 (*Lahori v. Radho*).

(4) 60 P. R. 1910 (*Mussammat Kokan v. Mussammat Lakho*).

(5) 61 P. R. 1906 (*Nur-ul-Nissa v. Gauhar-ul-Nissa*).

(6) 13 P. R. 1912 (*Ali Muhammad v. Suraj-ul-Din*).

khana-damad and appointed heir to Jaura and thus the alienation by will was unassailable. We have examined the evidence regarding *khana-damadship* and appointment as heir, and our conclusion is that these things are not proved. We think the facts are more consistent with the theory that Sundar Singh and his wife merely came from time to time and helped the old man and that the relations between them and him never went any further. But we need not discuss this matter in detail, for we think plaintiff fails on the question of power to contest. It is a power of a very unusual kind, usually found invested in agnates, which a daughter is not; and there can be no doubt that the burden of proof in issue 4 should have been laid initially on plaintiff.

In consequence of the views expressed by the Full Court aforesaid, which declined to deal directly with the questions referred to it by the Division Bench, we do not get much help from the rulings quoted before us and discussed at length in the aforesaid referring order. They are

5 *P. R.* of 1895 (1). noted in the margin. We must now take
 19 *P. R.* of 1906 (2). it that the *dictum* of Roe, S. J. in 5 *P. R.*
 61 *P. R.* of 1906 (3). 1895 (1), beginning "It must be re-
 72 *P. R.* of 1906 (4). membered" and ending "present holder
 60 *P. R.* of 1910 (5). of the estate" is little better than a pious
 13 *P. R.* of 1912 (6). opinion and *obiter dictum*; that the expressions of opinion and
 47 *P. R.* of 1912 (7). the findings in 19 *P. R.* 1906 (2), apply only to cases among
 the Ghelna Arains of Lahore, where daughters occupy a very
 strong position, and must not be treated as implying any
 inherent connection universally existing between the fact of
 heirship and the right to contest an alienation by the
 holder for the time being; that the *dictum* in 72 *P. R.*
 1906 (4), that where a widow of a reversioner might succeed
 collaterally to the widow of the last male holder and
 therefore had a right to control that widow's acts, is one applic-
 able solely to the Girths of the Kangra District and is not of
 general application; that a similar remark applies *mutatis*
mutandis to the *dictum* in 60 *P. R.* 1910 (5), that a sister
 among Girths of Kangra can control the widow of the last
 male holder. These rulings, then, being of no use to us in the

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- (1) 5 *P. R.* 1895 (*Sher Muhammad Khan v. Muhammad Khan*).
 - (2) 19 *P. R.* 1906 (*Chiragh Bibi v. Hassan*).
 - (3) 61 *P. R.* 1906 (*Nur-ul-Nissa v. Gauhar-ul-Nissa*).
 - (4) 72 *P. R.* 1906 (*Lahori v. Radho*).
 - (5) 60 *P. R.* 1910 (*Mussammat Kokan v. Mussammat Lakhoo*).
 - (6) 13 *P. R.* 1912 (*Ali Muhammad v. Suraj-ud-Din*).
 - (7) 47 *P. R.* 1912 (*Mussammat Zenab v. Shah Nawaz Khan*).

present case, which is concerned with Jat Sikhs of Jullundur, we have left 61 *P. R.* 1906 (1), in which it was pointed out that there is no necessary connection between A being heir to B and A's having the power to control B's dealings with the property A may some day inherit, a point also emphasized in 13 *P. R.* 1912 (2), with that view we express concurrence, and it follows that the *onus* should have been laid on plaintiff.

This being so, plaintiff's counsel urges quoting 24 *I. C.* 470 (3), a case of this Court, that the case should be remanded to the lower Courts to enable him to produce evidence in support of his contention that his client has by custom the power to control the acts of her mother. Asked what he has to say now in favour of that contention, he points to cases of *succession* by daughters in the Jullundur District; 172 *P. R.* 1889 (4), *Sayads*; 68 *P. R.* 1878 (5), *Julahas*; 61 *P. R.* 1902 (6), *Pathans*; and also to paragraph 23, Rattigan's Digest. He admits that his client is aware, and he is aware, of no Jat Sikh case in Jullundur District of a daughter's even succeeding against any collateral, much less of her contesting an alienation made either by a male or a female. In these circumstances we think it would be contrary to the practice of this Court to allow the parties to waste their time and money by a remand, albeit technically permissible.

The question of acquiescence was also argued before us, and, if a finding was necessary, we would find it in favour of plaintiff. As matters stand we need not discuss it. We hold that plaintiff has no *locus standi* to sue and we dismiss the appeal, with costs.

Appeal dismissed.

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No. 34.

Before Hon. Mr. Justice Chevis and

Hon. Mr. Justice LeRossignol.

NUR ALI AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

BAHAWAL AND OTHERS—(DEFENDANTS)—

RESPONDENTS.

Civil Appeal No. 165 of 1913.

Punjab Courts Act, III of 1914, section 4 (3)—second appeal—without certificate—existence of a custom.

The plaintiffs, as collaterals of one K. B., sued for a declaration that a deed of gift of ancestral land effected by K. B.'s widow in favour of a person

(1) 61 *P. R.* 1906 (*Nur-ul-Nissa v. Gauhar-ul-Nissa*).

(2) 13 *P. R.* 1912 (*Ali Muhammad v. Suraj-ud-Din*).

(3) (1914) 24 *Indian Cases* 470 (*Gobind Ram v. Rani Suraj Kaur*).

(4) 172 *P. R.* 1889 (*Mussammat Fatima v. Ghulam Muhammad Shah*).

(5) 68 *P. R.* 1878 (*Badhawa v. Gandhella*).

(6) 61 *P. R.* 1902 (*Wazir Ali Khan v. Mussammat Asmat Bibi*).

who it was asserted in the deed had been adopted by her late husband should not affect their reversionary rights. The defence was simply that the donee was the appointed heir of K. B. and that in the circumstances the widow was entitled to rectify the erroneous mutation made in her favour at her husband's death. Both the lower Courts agreed in finding that the alleged adoption had not been proved but the Divisional Judge found that the gift was justified by the fact that the donee had rendered services to the widow. The plaintiffs presented a second appeal to the Chief Court urging that the Lower Appellate Court had decided the case on a point entirely outside the pleadings.

Held, following 19 P. R. 1915 (1) that a second appeal was competent without a certificate, as the question raised in the appeal was not the validity or existence of a custom but whether the validity or existence of a custom was a question properly before the Lower Appellate Court.

Second appeal from the decree of A. E. Martinean, Esquire, Divisional Judge, Rawalpindi, dated the 4th November 1912.

Muhammad Shafi, for Appellants.

Beechey and Muhammad Sharif, for Respondents.

The Judgment of the Court was delivered by—

8th Nov. 1915.

LEROSSIGNOL, J.—This was a suit for a declaration that a gift of 476 *kanals* of ancestral land should not affect the rights of the plaintiffs who are collaterals of Karam Bakhsh, the last male holder. The gift was effected by registered deed on 30th January 1911 by Mussammat Gauhar Bibi, the widow of Karam Bakhsh.

The deed recites that the reason and justification for the gift was the adoption of the donee by Karam Bakhsh, some time before 1868, the approximate date of Karam Bakhsh's demise, that for some unknown reason mutation on his death was made in favour of his widow and not in favour of the appointed heir and the widow now made the gift in furtherance and completion of (*taid afál*) her husband's acts.

The defence was simply that the donee was the appointed heir and that in the circumstances, the widow was entitled to rectify the erroneous mutation made at her husband's death by making the gift.

Both Courts below have found that the donee was not appointed his heir by the late Karam Bakhsh and the first Court decreed for plaintiffs; the Divisional Judge, however, though agreeing as to the appointment with the first Court, dismissed the suit on the ground that the donee had rendered services to the widow, who was consequently justified by custom in making the gift by way of compensation for services rendered.

In second appeal before this Court it is contended that the Divisional Judge has decided the case on a point entirely outside the pleadings, that the only plea for the defence was that the gift was justified by the adoption and that there was no defence that the gift was warranted by a widow's general right to gift for services rendered.

For the respondents it is urged that no appeal lies without a certificate and that the fifth issue covered the general custom, on which moreover the plaintiffs adduced evidence.

As to the competency of the appeal, we hold following 19 P. R. of 1915 (1) that the question raised in this appeal is not the validity or existence of a custom, but whether the validity or existence of a custom was a question properly before the Lower Appellate Court and we find that the appeal does lie.

Having carefully scrutinized the pleadings, statements of parties and the statement of defendant's pleader, we find that there was no plea that the widow had a general right of gift for services rendered. The sole plea was the alleged appointment, and though defendant's pleader stated that the gift was warranted by custom, it is clear that he used the word "*Riwojan*," as signifying solely that the widow was by custom justified in rectifying the error of mutation by which she had been preferred to the appointed heir.

It is true that the plaintiffs put in three copies of judgments, but they were intended to show that a widow could not gift even in favour of a *khana-damad* or even a daughter's son and may have been intended merely to show that a widow could not make a gift even in favour of an appointed heir, who had slept on his rights for nearly 50 years.

We find then that "services rendered" and a general right of gift by a widow for services rendered were never mentioned in the pleas, that the sole question properly before the Courts was the alleged appointment. That question we have no manner of doubt whatever was rightly answered in the negative and that concluded the case.

We find therefore that the general question of gift by a widow was not properly before the Lower Appellate Court and we accept this appeal and decree for the plaintiffs with costs throughout.

Appeal accepted.

(1) 19 P. R. 1915 (*Santa Singh v. Waryam Singh*).

No. 35.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
LeRossignol.

JAT MAL AND ANOTHER—(DEFENDANTS)—
APPELLANTS,
Versus

BELI RAM—(PLAINTIFF)—SUKHU AND OTHERS
—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1294 of 1909.

Indian Registration Act, III of 1877, section 17 (b)—registration of documents evidencing a partition—whether admissible for collateral purpose.

Held, that the documents produced in this case for the purpose of proving a partition were, taken together, a non-testamentary document extinguishing the right of plaintiff in certain immoveable property exceeding Rs. 100 in value *inter alia* and acknowledging receipt of other property in lieu of his relinquishment and were, consequently, not receivable in evidence for want of registration.

Held also, that these documents could not be looked at in this case for possession of the immoveable property they purported to dispose of, for any purpose whatsoever.

17 *Mad. L. J. R.* 469 (1) and 3 *Mad. L. T.* 187, referred to.

25 *W. R.* 211 (2) and 6 *Mad. L. T.* 192 (3), distinguished.

First appeal from the decree of M. H. Harrison, Esquire, District Judge, Simla, dated the 9th November 1909.

Muhammad Shafi, Broadway, B. Bevan Petman and Santanam, for Appellants.

Nanak Chand, for Respondents.

The Judgment of the Court was delivered by—

10th Nov. 1915.

LEROSSIGNOL, J.—This was a suit brought by Beli Ram for a declaration that the sale of the shop in dispute by Sukhu, Jholu and Badri to the principal defendants should not affect his one-fourth share in the shop and for possession of that one-fourth share.

The Court below has decreed in plaintiff's favour and this appeal is preferred by the vendees, on whose behalf counsel urges that plaintiff's original one-fourth share had by partition in January 1900 fallen to the share of Sukhu, who thereby was competent to convey it to the vendees, that even if the alleged partition be not established the plaintiff is estopped by his conduct from claiming one-fourth from the vendees and finally that as the whole shop, originally *kacha* had been burnt down

(1) (1907) 17 *Mad. L. J. R.* 469 (*Kamparti Subbayya v. Kurnam ; Mad-duletiah*).

(2) (1876) 25 *W. R.* 211 (*Lalla Gopee Chand v. Shaikh Liakut Hossein*).

(3) (1909) 6 *Mad. L. T.* 192 (*Venkatachari v. Rangaswami Iyengar*).

and rebuilt by the vendors of *pakka* masonry, plaintiff was not entitled to a decree for possession except on the condition that he first paid one-fourth share of the cost of reconstruction.

The first point for decision is whether the documents D 1, D 2, D 3, D11, on which the appellants rely to prove the partition between Sukhu and plaintiff, are admissible in evidence. The Lower Court has held that their registration was compulsory and that they in their unregistered condition are inadmissible, and having heard counsel for appellants at great length, we are entirely at one with the Lower Court in its view on this portion of the case.

D 1 is an inventory of properties including the share of the shop in dispute, which purport to have fallen to Sukhu's share in a partition alleged to have taken place on 15th January 1900. D 2 is a *farigh khatti* or deed of release of the same date.

Both are unregistered; D 2 is the conveyance and D 1 is merely a list of property conveyed.

They both refer to one and the same partition and are clearly parts of one whole; the whole is clearly a non-testamentary document, extinguishing the rights of Beli Ram in certain immoveable property exceeding Rs. 100 in value (*inter alia*) and acknowledging receipt of other property in lieu of his relinquishment. D 3 is an almost similar declaration of the extinction of his title in the same property, and it is dated 28th March 1902.

D 11 is a partition deed purporting to record a partition between Sukhu and Badri on 31st March 1903.

These documents should have been registered, and as they are not registered, we hold them inadmissible for any purpose tending to indicate that plaintiff has lost by partition his original one-fourth share in this shop.

Appellants have cited 25 W. R. 211 (1), 6 M. L. T. 192 (2) with approval, as authority for the view that an unregistered document is admissible for a collateral purpose; the expression "collateral purpose" is a very vague one, and we note that in the decisions quoted no reasons are given for the view adopted, whilst they were not approved in—

17 M. L. J. R. 469 (3).

3 Mad. L. T. 187.

(1) (1876) 25 W. R. 211 (*Lalla Gopee Chand v. Shaikh Liakut Hossein*).
 (2) (1909) 6 Mad. L. T. 192 (*Vankatachari v. Rangaswami Iyengar*).
 (3) (1907) 17 Mad. L. J. R. 469 (*Kamparti Subbayya v. Kurnam Mad-duletiah*).

We are clear that these documents cannot be looked at in this case for possession of the immoveable property they purport to dispose of, for the adoption of a different course would permit them to affect that property and to be received as evidence of a transaction affecting that property.

As for D 11, it is suggested in a half hearted manner that as an award it does not require registration, but it is sufficient to say that it does not purport to be an award, but a record of a partition effected by the co-sharers on lines suggested by third persons

Our ruling then is that these documents are inadmissible to prove the partition or the conduct of the original shares of the property in regard to the partition.

The next argument is that plaintiff is estopped by his conduct from 1900 up to the date of sale in favour of appellants from maintaining this claim, but after taking us through the oral evidence, counsel was constrained to admit that nothing more than inactivity could be charged against plaintiff on this score.

He allowed Sukhu to mortgage the shop without reference to his (plaintiff's) title, and he took no part in rebuilding the shop after the fire.

It is further urged that he must have been aware of Sukhu's operations, inasmuch as his son Nanak Chand was working in Simla with Sukhu and plaintiff himself came occasionally to Simla.

We quite fail to understand how an estoppel can be said to have been established.

The facts are that plaintiff is a busy man with many interests in Kangra, that he rarely came to Simla, that there is no evidence of his presence in Simla on any particular date, that Sukhu was given by plaintiff a general power of attorney in 1899, that Nanak Chand in 1902 when Sukhu first mortgaged the half share in the shop on his own account was a mere youth of 19, that he and Sukhu did not occupy this shop but another some half a mile distant, and it is not by any means certain that Nanak Chand knew the details of Sukhu's dealings with this property. He does not appear to have attested any of the mortgage or lease deeds.

Similarly, we can attach no value to the purely *ex parte* proceedings by which Beli Ram, plaintiff's name, was expunged from the Municipal Ground Rent Registers.

Finally, though we regard plaintiff's assertion that he contributed to the cost of rebuilding the shop as a manifest

falsehood, we fail to see that his failure to contribute bars his claim; even the co-sharers rebuilt on credit and paid the cost only out of the sale price; the reconstruction took place in 1906-7 and plaintiff came into Court at the end of 1907.

We hold that plaintiff's claim is not barred by estoppel.

Mr. Shafi for appellants wished to argue that plaintiff was bound to fail, for either the power of attorney authorized Sukhu to represent him or the power of attorney had been extinguished by the partition.

This argument needs no discussion, for it was never the appellant-defendants' case that they had purchased the plaintiff's share through his attorney Sukhu, and as the partition deeds have been rejected, the partition cannot be proved *aliunde*.

The next point urged for appellants was that as the plaintiff had looked on whilst expensive buildings were being erected, he had lost all right to his share and many a ruling was cited in support. They need not be detailed here for they were all readily distinguishable. The defendants did no building, nor was the plaintiff present, looking on.

Finally it was contended that if plaintiff at all succeeded, it should be only on the condition of his paying to defendants vendees one fourth share of the sale price which had gone to pay the cost of rebuilding and to redeem the earlier mortgage. An even greater sum was at first suggested, on the ground that the vendees appellants stood in the shoes of the prior mortgagees and were entitled to interest, but this contention was ultimately dropped.

In reply, respondent's counsel did not challenge the *amount* to be paid by his client as a condition of possession, but contended first that his client had contributed to the cost of rebuilding; this contention however was very luke-warmly sustained, and, in the absence of all evidence on the point, was quickly dropped.

The only other objection was that the rebuilding had been effected without the permission of the plaintiff, and that it was unfair to make the payment of a large sum the condition of his entry.

This argument is plainly disingenuous; the shop had been gutted and was a mere collection of rubbish, the mortgage had to be redeemed and the other co-sharers were justified in rebuilding.

Finally, if plaintiff is to be placed in possession of a portion of a valuable building instead of a portion of a charred

site, it is only equitable that he should pay for the improvement in his property.

The learned counsel for respondent admitted he could not support the Lower Court's reasons for passing an unconditional decree subject to the result of any subsequent suit for contribution which defendants might bring against plaintiff; it is clear that the defendants appellants have a lien on the shop, till plaintiff has paid his share of the cost of rebuilding and of the mortgage burden.

On these findings, we accept the appeal and modify the lower Court's decree against appellants by providing that before taking possession of his one-fourth share plaintiff shall pay to appellants one-fourth of Rs 18,500.

As plaintiff's assertion in regard to his contribution to the cost of rebuilding is clearly false, we direct that the parties to this appeal bear their own costs both in this Court and in the Court below.

Appeal accepted.

No. 36.

Before Hon. Mr. Justice Rattigan and Hon.

Mr. Justice Shadi Lal.

LAHORE BANK LIMITED—(IN LIQUIDATION)—
APPELLANT,

Versus

KIDAR NATH—RESPONDENT.

Civil Appeal No. 665 of 1915.

Indian Companies Act, VI of 1882, section 150 (corresponding to section 186 of the new Act, VII of 1913)—Companies in liquidation—power of Court in winding-up proceedings to order payment of a debt due by a contributory—when to be exercised.

Held, that the Court in winding-up proceedings is, under section 150 of the Indian Companies Act, 1882, empowered to call upon a contributory to pay to the liquidator a debt due by him to the Company on a pro-note.

59 P. R. 1915 (1) and 4 Ch. Ap. 475 (2), referred to.

Held also, that although the jurisdiction of the Court is permissive, it should not be declined when a case is made out for the exercise thereof, unless very cogent reasons to the contrary are shewn.

Miscellaneous first appeal from the order of Rai Bahadur Lala Damodar Das, Additinal Judge, Lahore, dated the 19th February 1915.

Sundar Das, for Appellant.

B. Bevan Petman and Gullu Ram, for Respondent.

The Judgment of the Court was delivered by—

SHADI LAL, J.—The facts of this case are very simple and do not admit of any dispute. The respondent, Lala Kidar

19th Nov. 1915.

(1) 59 P. R. 1915 (*Kamta Pershad v. Industrial Bank of India*).

(2) (1869) 4 Ch. Ap. 475 (*In re Mercantile Trading Coy.—Stringer's case*).

Nath, has been settled on the list of the contributories of the Lahore Bank, Limited, which is being wound up subject to the supervision of the Court, and he owes a sum of money to the Bank on a pro-note executed by him. The main question for decision is whether the Court in a winding-up proceeding is empowered to call upon him to pay the debt to the liquidator. The answer to this question depends upon the interpretation to be placed upon section 150 of the Indian Companies Act, VI of 1882, which runs as follows :—" The Court may, at any time after making an order for winding-up the Company, make an order on any contributory for the time being settled on the list of contributories directing payment to be made, in manner in the said order mentioned, of any moneys due from him, or from the estate of the person whom he represents, to the Company, exclusive of any moneys which he, or the estate of the person whom he represents, may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act."

Now, the language of the statute is very comprehensive, and it appears to us that a debt due on a pro-note by a contributory is " money due from him to the Company " within the purview of the aforesaid section.

The learned counsel for the respondent contends that the law is intended to apply only to such moneys as are due by a contributory in his capacity as a member and not to debts due in his private capacity. To sustain this contention we would have to read into the section after the word " due " some words to the following effect " as contributory " and we do not see any reason for making this addition. Indeed there is no canon of the interpretation of statutes which would justify us in adopting this course.

The learned counsel on both sides are unable to cite any case, in which the matter in controversy in this appeal was raised and adjudicated upon. The judgment in 59 *P. R.* 1915 (1) delivered by a member of this Bench determines the question against the respondent, and the only other case having a bearing on the subject, we have been able to discover, is that of Mercantile Trading Company, *Stringer's case*, *IV Chancery Appeals* 475 (2). That case related to the Court's power to order a contributory to repay a dividend declared and paid under a fraudulent balance sheet and the decision on the point rested upon the interpretation of section 101 of the English

(1) 59 *P. R.* 1915 (*Kamta Pershad v. Industrial Bank of India*).

(2) (1869) 4 *Ch. Ap.* 475 (*In re Mercantile Trading Coy—Stringer's case*).

Companies Act of 1862, which section, it is to be observed, is in *totidem verbis* as the aforesaid section 150 of the Indian Act. The Vice-Chancellor Malins, before whom the case came up in the first instance, was of the opinion that the liability to refund a dividend paid under a delusive and fraudulent balance sheet could not be regarded as money due from a contributory to the Company within the meaning of section 101, and his judgment on this point was set aside by the Court of Appeal which came to the conclusion that the section conferred upon the Court the jurisdiction to grant a summary application for the return of the dividend so paid. Now, we find that, despite the fact that the Vice-Chancellor was not prepared to go so far as to bring the aforesaid claim within the terms of the section, he made the following observations with reference to the meaning and the object of the law :—" Now, this appears " to me to be directed to the case of debtors to the Company in " the ordinary sense of the word. If you go through the ledger " you find A, B, C, and D, and so forth, indebted to the Com- " pany ; the account being settled, the object of this section " is to enable the Court to make a summary order upon the " debtors of the Company in the ordinary sense of the word, " to pay that debt." These remarks of the learned Judge make it clear that the present claim of the liquidator against the respondent is within the strict letter of the law and that the Court can exercise its summary jurisdiction to enforce the recovery thereof.

It is to be observed that the marginal note, both in the Indian and the English Acts, is in the following terms : " Power " of Court to order payment of debts by a contributory " and the same expression is repeated in the Companies Consolidation Act of 1908 and the Indian Companies Act, 1913, (*vide* section 165 and section 186 respectively). The word " debts " is significant, and though the marginal note cannot be relied upon in clearing up ambiguity in the text of the written law, it may with advantage be referred to when it confirms the conclusion warranted by the language of the section.

We are fortified in the result we arrive at by the consideration that the Legislature in enacting the section intended, as pointed out in 59 *P. R.* 1915 (1), to provide a cheap and expeditious method of getting at the assets of the Company and that the object aimed at would be defeated, if the liquidator were required to bring a regular action on payment of an *ad valorem* Court fee and subjected to the usual delay consequent upon an appeal in a suit. To quote the words of the Court of

Appeal in Stringer's case, the law was enacted in order that by means of proceedings under the Act "without any double process or double set of proceedings complete justice might be done between the parties, and a complete winding-up effected." One of the learned Judges of the Court of Appeal in explaining the principle of the section further observes that there may be some very rare instances "where it may be necessary to have the facts stated upon the records, but wherever upon notice of motion, and upon affidavit, and due examination of witnesses you can properly arrive at a conclusion, I can see no reason whatever why a bill should be filed. It only adds to the expense—upon notice of motion, and affidavits, and examination of witnesses complete justice can be done—the evidence can be taken under the winding-up just in as many ways as it can be taken upon bill filed; and, what is more important, there are the same means of hearing in the Court below, and the same means of appeal to this Court and to the House of Lords. Therefore I can see no reason why any narrow construction should be put upon the Act, and I think it would be to the disadvantage of the public that a narrow construction should be put upon it." The above quotation sets out very clearly the justification of the rule which finds expression in section 150 of the Indian Act. The party proceeded against has really no reasonable cause for complaint because in the summary proceeding every objection is just as open to the person sought to be charged as it would have been, if a suit had been instituted.

Upon a careful examination of the very wide and general terms in which the section is expressed, we are of opinion that the Court has, upon a summary application presented to it, the power to direct the contributory to pay not only all moneys due from him as a member but also any debt due from him to the Company. The jurisdiction under the Act is no doubt permissive, but when a case is made out for the exercise thereof, it should not be declined unless very cogent reasons to the contrary are shewn. There are cases in which the Court has refused to proceed summarily, when all the parties concerned were not amenable to the jurisdiction of winding-up, and the Court did not consider it right and just to have a piecemeal litigation, but in the case before us the debt is admitted by the respondent, and the circumstance, that the pro-note in question was signed by another person as a surety who is not before the Court and is not subject to the summary jurisdiction cannot be regarded as an adequate reason for refusing to exercise the statutory power against a person who is amenable to its jurisdiction.

For the foregoing reason, we accept the appeal and setting aside the order of the Additional Judge we direct him to proceed against the respondent under section 150 in accordance with law. The respondent must pay the costs incurred by the appellant in this Court.

Appeal accepted.

No. 37

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

GIRDHARI LAL—(DEFENDANT)—APPELLANT,

Versus

ATTAR—(PLAINTIFF)—MIR ZAMAN—(DEFENDANT)—
RESPONDENTS.

Civil Appeal No. 574 of 1915.

Punjab Pre-emption Act, II of 1905, section 11—member of same tribe—Darzi Mir and Darzi Mughal—district Rawalpindi.

The plaintiff, a Darzi Mir of *mauza* Kuri in the district of Rawalpindi, sued for pre-emption in respect of certain sales of agricultural land situate in *mauza* Majhuan, the vendor being a so-called Darzi Mughal and the vendees Brahmans of Rawalpindi city. The plaintiff claimed to be of the same tribe as the vendor under the *proviso* to section 11 of the Punjab Pre-emption Act.

Held, that in deciding whether persons belong to the same tribe, where the real facts are impossible to ascertain, names used are the only *data* left and should be dealt with in a liberal spirit.

112 P. R. 1908 (1) and 62 P. R. 1909 (2), referred to.

Held consequently, that in the absence of proof to the contrary *Darzi Mir* and *Darzi Mughal* are sub-divisions of a tribe of Darzis.

Second appeal from the decree of Lieutenant-Colonel O. P. Egerton, District Judge, Rawalpindi, dated the 5th February 1915.

Gobind Das, for Appellant.

G. C. Narang and Har Gopal, for Respondents.

The Judgment of the learned Chief Judge was as follows :—

23rd Nov. 1915

SIR DONALD JOHNSTONE, C J.—In these three pre-emption cases (Nos. 574, 575 and 576 of 1915) the same question comes up for decision in this Court and they can be conveniently disposed of in one judgment. The plaintiff is in each case one Attar, a Darzi Mir of *mauza* Kuri in the district of Rawalpindi, vendees are Brahmans of Rawalpindi City and vendor a so-called Darzi Mughal. It is admitted on all hands that vendors and plaintiff alike are non-agriculturists and do not belong to any “agricultural tribe;” but plaintiff claims under section 11 of the Act. It is clear that he has a right of pre-emption

(1) 112 P. R. 1908 (*Ali Muhammad v. Shaman*).

(2) 62 P. R. 1909 (*Mangha Ram v. Mengha Ram*).

if he can be considered to be of the *same tribe* as [the vendors.] The first Court has found that Darzi Mughal and Darzi Mir are not one tribe but two distinct tribes, while the Lower Appellate Court relying upon 62 *P. R.* 1909 (1) and 112 *P. R.* 1908 (2) and making capital out of the circumstance that the volume of customary law of the District contemplates the existence of "menial" tribes as such, has ruled that, in this village of Majhuhan, Darzi Mir and Darzi Mughal are included in the "tribe" of Darzi.

The question is by no means an easy one. Nowhere either in the Act or in the rulings of this Court is any definition of tribe to be found. In 112 *P. R.* 1908 (2) the question was whether a Sheikh Ansari of the Ferozepur District could be said to be of the same "tribe" as a Sheikh Kureshi. The answer was given in the affirmative. Though there were admittedly great difficulties in the way, the Division Bench laid down two principles, first, that, where precise and reasoned decision was *impossible*, the Courts should not attempt the impossible; and secondly, that, as ethnological experts differed as to what was a tribe, Courts should give the word the broadest construction possible. It is not for me to say whether these principles of decision are sound. They were laid down by a Judge who was a revenue expert, and a lawyer Judge of great experience; and their views deserve respect. But I think I am justified in holding that they are not much of a guide in the present case. One great difficulty in that case was that it was doubtful whether the so-called Kureshi was anything better than a descendant of a Khatri who in turning *Muhammadan*, called himself, according to a common practice, Sheikh, and later raised himself in the social scale by adding Kureshi. If the learned Judges had been clear that the Kureshi was really one of the famous Kureshis of Arabia and the Ansari really one of the equally famous distinct tribe of *Ansari*, I very much doubt whether their decision would not have been the other way. In short I do not think the ruling is of use except to this extent that, where the real facts are impossible to ascertain, names used are the only *data* left and should be dealt with in a liberal spirit.

In 62 *P. R.* 1909 (1) a Division Bench held that Aroras of the Kukreja *got* are of the same "tribe" as those of the Gidar and Sibra *gots*, all of the same village. This is an intelligible and reasonable position and settles the question for the Aroras

(1) 62 *P. R.* 1909 (*Mangha Ram v. Mengha Ram*).

(2) 112 *P. R.* 1908 (*Ali Muhammad v. Shaman*).

of that village, which by the way is not named in the report. Now let us see what *data* we have in the present case. In Rose's Glossary of Tribes and Castes in the Punjab and North-West Frontier Province, Vol. II, page 223, it is laid down that no *tribe* of Darzis is known; and in the Census Report of 1901 by the same officer, Vol. 17, Part I, Chapter VIII, an attempt is made to define "tribe" as a body of persons who historically or by tradition are descended from a common ancestor. Again in Pandit Hari Kishen's Census Report of 1912 the author talks of occupations gradually crystallising into *castes*.

Apart from all this we have on the record some information which may be summarised thus. In a *Rubkar* of 1858 Jiwan, ancestor of the vendors, is called Mughal merely; but in the Records of the first Regular Settlement of *Mauza* Majhuban (a few years later) he is described as Darzi, got Ghosar or Ghara. In Kori village at the Summary Settlement predecessors of plaintiff are called Darzi merely; but in the first Regular Settlement the same persons are called *Darzi got* Mira or Mir. In the second Settlement there was the same description. In these circumstances I think it is impossible to hold that these people are Mughals and Kashmiris respectively, who called themselves Darzi because some of them became traders. I have no hesitation in finding that Darzi Mir and Darzi Mughal are sub-divisions of a tribe of Darzis and I dismiss the appeal with costs.

Appeal dismissed.

No. 38.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

MUSSAMMAT RAJ KAUR AND MUSSAMMAT LACHMI—

(DEFENDANTS)—APPELLANTS,

Versus

TALOK SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 2396 of 1914.

Custom—succession—self-acquired property—Gil Jats of Mauza Lohara, tahsil Zira, district Ferozepore—daughters and near collaterals—Riwaj-i-am—entry in, regarding succession to land—without discrimination between ancestral and self-acquired property.

Held, that the plaintiffs, on whom the *onus* rested, had failed to prove that by custom among Gil Jats of *mauza* Lohara, *tahsil* Zira, district Ferozepore, they, as near collaterals of a deceased sonless proprietor, succeeded to his self-acquired estate in preference to a daughter.

2 P. R. 1909 (1), 25 P. R. 1912 (2), and Rattigan's Digest para. 23 (2), referred to.

(1) 2 P. R. 1909 (*Nidhu v. Ram Singh*).

(2) 25 P. R. 1912 (*Partap Singh v. Mussammat Panjabee*).

Held also, that an entry in a *Riwaj-i-am* concerning succession to landed property, without discrimination between ancestral and self-acquired, must usually be held to refer only to ancestral property, particularly when the *Riwaj-i-am* was prepared more than 25 years ago, i.e. at a time when little attention was paid to the rights of daughters.

Second appeal from the decree of J. A. Ross, Esquire, Divisional Judge, Ferozepore Division, dated the 17th July, 1914.

Badr-ud-Din, for Appellants.

Ganpat Rai, for Respondents.

The judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—In remanding this case 29th Nov. 1915. under Order 41, rule 25, Civil Procedure Code, this Court indicated that there lay upon the plaintiffs in the present case the burden of proving that by special custom among Gil Jats of mauza Lohara, tahsil Zira, district Ferozepore, the near collaterals of a deceased souless proprietor succeed to his self-acquired estate in preference to a daughter. The *onus* was laid thus by this Court on the strength of the proposition in section 23 (2) of Rattigan's Digest, and of such rulings as 2 P. R. 1909 (1) and 25 P. R. 1912 (2). The first Court appointed a competent legal practitioner to make a local enquiry, and that gentleman seems to have taken a good deal of trouble, having examined 120 witnesses for the plaintiffs and 20 for the defendants in no less than 11 villages. The plaintiff's witnesses gave opinions in favour of the plaintiffs, and similarly the defendant's witnesses gave opinions in favour of the defendants. A few instances were also brought to the notice of the local commissioner and are discussed in the return made to the remand. In my opinion the plaintiffs have not succeeded in rebutting the presumption that exists against them. In their favour there is no doubt a statement of opinion by a considerable mass of witnesses, but scattered here and there among the statements of these witnesses are admissions of a few instances in which daughters did succeed to their father's self-acquired property and I can find no good case of exclusion of daughters. The plaintiffs also rely upon the *Riwaj-i-am*, especially section 45 of it. Now, that *Riwaj-i-am* was compiled in 1878, and it is only in the last 25 years or so that attention has been paid to the rights of daughters; and there can be no doubt those rights have been in these years more and more recognized by the people themselves. Further, though the Lower Appellate Court attempts to shew that section 45 of this *Riwaj-i-am* covers the case of self-acquired property, it certainly does not do so

(1) 2 P. R. 1909 (*Nidhu v. Ram Singh*).

(2) 25 P. R. 1912 (*Partap Singh v. Mussammat Panjabee*).

in set terms, and there are more rulings than one of this Court to the effect that where the *Riwaj-i-am* talks about landed property and succession to it and so forth, without discrimination between ancestral and self-acquired, the rule laid down can usually only be taken to apply to ancestral property. In these circumstances I do not think that the *Riwaj-i-am* by itself can shift the burden of proof to the shoulders of the defendants.

The documentary evidence on the record is to be found mentioned in the return to the remand and also in the judgments of the Lower Courts. No great amount of discussion is required to show that those documents are very far from proving any special custom in favour of the plaintiffs. If anything, they are in favour of the defendants, *e. g.*, Exhibit K-2, in which there is a clear statement of opinion that a daughter succeeds to self-acquired property. No doubt this statement of opinion might be said to be *obiter dictum*, but on the other hand there is absolutely nothing in the judgment in favour of the plaintiffs. Again in Exhibit K-1, a judgment by Mr. Craik, the decision was based on the *factum* of plaintiffs being related to the last male owner and has really no bearing on the present case at all. Exhibit K-4 seems to be a case which, for what it is worth, is entirely in favour of the defendants; and in short it is quite apparent that on the record there is absolutely no proof whatever of any special custom among these *Gil Jats* excluding daughters from succession to self-acquired property.

For these reasons I accept the appeal and find the question of custom in favour of the defendants and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

No. 39.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

KARAM ILAHI—(PLAINTIFF)—APPELLANT,

Versus

GULAB RAI AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1916 of 1915.

Punjab Alienation of Land Act, XIII of 1900, sections 2 (3) and 16—Attachment of mortgagee rights in execution of a money decree—transfer by judgment-debtor of his property after decree—fraud on decree-holder—right of transferee to object to attachment of the property.

One A. D., a member of an agricultural tribe, held a mortgage over certain land. On the 19th February 1914 one G. R. obtained a money decree

against A. D. and on the 5th March 1914 A. D. mortgaged his mortgagee rights to his brother, the present plaintiff; on the 27th April 1914 G. R. got the mortgagee rights of A. D. attached in execution of his decree. The plaintiff then instituted the present suit for a declaration that the mortgagee rights could not be attached and sold in execution of the decree.

Held, following 12 P. R. 1911 (1) that the mortgagee rights of A. D. being "land" could not be sold in execution of the decree, *vide* sections 2 (3) and 16 of the Punjab Alienation of Land Act.

Held also, that a judgment-debtor is not bound to keep his property in a shape convenient for his creditors to proceed against and that the transfer by A. D. of his mortgagee rights to plaintiff for consideration 6 weeks before attachment, though it might be sharp practice, was not fraudulent in law.

Held further, that as plaintiff's interests were injured by the execution proceedings of G. R. against A. D. he was entitled to object to them.

Second appeal from the decree of A. E. Martineau, Esquire, District Judge, Gurdaspur, dated the 12th of May 1915.

Muhammad Iqbal, for Appellant

Rambhaji Datta, for Respondents.

The judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—In this case one Mihan Singh appears to have mortgaged certain land to defendant No. 2, Allah Ditta. Plaintiff is Allah Ditta's brother. On 19th February 1914 defendant 1 Gulab Rai obtained a money decree against defendant 2 and naturally intended to execute the decree without delay. On 5th March 1914 defendant 2 mortgaged for Rs. 225 his mortgagee rights aforesaid to plaintiff. On 27th April 1914 defendant 1 got defendant 2's mortgagee rights attached in execution of his decree. Upon this plaintiff brought the present suit for a declaration that defendant 1 had not by law the right to attach the aforesaid property. The first Court held that the mortgage to plaintiff was made in good faith and for consideration, and that under section 2 (3) of the Land Alienation Act the rights of defendant 2 in the land could not be attached in execution of a decree. On these findings that Court gave plaintiff the declaration sought for. But when the case came before the District Judge on appeal he took a totally different view. As regards the question of attachment he drew a distinction between the *Zare-i-rahn*, which was attached under Gulab Rai's application for execution, and the mortgagee rights dealt with in section 2 (3) of the Punjab Alienation of Land Act and 12 P. R. of 1911 (1). He held that the *Zare-i-rahn* could be attached notwithstanding the Alienation of Land Act. In my opinion the distinction drawn is sophistical. The proper way to look at the matter

+ is this. Suppose Gulab Rai's application for attachment had been carried into full effect and auction sale had taken place, what would be the position of the auction purchaser? No money would have been handed over to him then and there. He would simply have acquired *the right to enforce defendant 2's mortgage*; and I am unable to see any distinction between this and a sale of the mortgagee rights.

This is sufficient for the determination of the appeal, but I think it is desirable for me to point out that Mr. Martineau in my opinion also goes wrong on other points in the case. He says that even if the consideration passed in full from plaintiff to defendant 2, the mortgage would be invalid, because it was made with the intention of defrauding the appellant, that is, defendant 1. This seems to me to be quite contrary to common sense and to the authorities. The mortgage by defendant 2 was made six weeks before the attachment, and according to law defendant 2 was not bound to keep his property in a shape convenient for his creditors to proceed against. The Lower Appellate Court doubts whether full consideration passed but does not give any finding on the subject. It seems to admit that Rs. 200 passed but is doubtful of about Rs. 25. In my opinion, there is no reasonable doubt on the subject whatever. I hold that full Rs. 225 passed and that the mortgage by defendant 2 to plaintiff, though it may have been sharp practice was not fraudulent in law.

Lastly, I entirely dissent from the Lower Appellate Court's idea that it does not lie in the mouth of the plaintiff to object to the attachment by Gulab Rai, defendant 1, of the rights of defendant 2, but that this objection can only be raised by defendant 2 himself in execution proceedings. In taking this view the Lower Appellate Court overlooks the fact that plaintiff's interests are vitally bound up with the interests of defendant 2. It seems to me quite clear that, when defendant 1 so acts towards defendant 2 as to injure plaintiff's interests, plaintiff is certainly entitled to object to the action taken against defendant 2.

For these reasons I accept the appeal, set aside the judgment and decree of the Lower Appellate Court and restore the decree of the first Court with costs throughout.

Appeal accepted.

No. 40.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

FAZAL—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT HASHMATI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2425 of 1915.

Civil Procedure Code, Act V of 1908, section 105 and order 43, rule 1 (d)—appeal from an order setting aside a decree passed ex-parte—whether competent, and whether errors made by Court in making such an order can be raised in appeal from the decree.

Held, that while an appeal lies under order 43, rule 1 (d) of the Code of Civil Procedure against an order refusing to set aside a decree passed *ex-parte* no appeal lies against an order setting aside such a decree.

Held also, that any error etc., made by a Court in setting aside an *ex-parte* decree, is not an error etc., “affecting the decision of the case” within the meaning of section 105 of the Code and therefore can not be “set forth as a ground of objection in the Memorandum of appeal.”

I. L. R. 25 All. 280 (1), followed.

Second appeal from the decree of A. E. Martineau, Esquire, District Judge, Gurdaspur, dated the 31st May 1915.

Zia-ud-Din, for Appellant.

Muhammad Iqbal, for Respondents.

The Judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—The case was admitted only 2nd Dec. 1915
on ground 2, and no other ground has been argued. The remaining grounds are either all disposed of by findings on questions of fact or are—grounds 1 and 3—clearly unsound. As regards ground 2 I find in favour of respondents—*I. L. R. 25 All. 280 (1)*. That ruling, of course, deals with the old Code of Civil Procedure, but the law has not been altered. I agree with the view taken in that ruling and hold that under the Civil Procedure Code while an appeal lies (Order XLIII, Rule 1 (d)) against an order refusing to set aside a decree passed *ex-parte*, no appeal lies against an order setting aside such a decree; and that, adverting to section 105 (1) of the Code, any error, &c., made by a Court in setting aside an *ex-parte* decree is not an error, &c., “affecting the decision of the case” and therefore cannot be “set forth as a ground of objection in the Memorandum of appeal.”

This being so, the appeal fails and is dismissed with costs.

Appeal dismissed.

No 41.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shadi Lal.

KALU AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

MEHRU MAL AND LARKA RAM—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 257 of 1913.

Indian Limitation Act, IX of 1908, sections 14 and 19—Acknowledgment of subsisting liability in pleadings—extension of time spent in previous proceedings—due diligence.

Held, that where defendants had in written pleadings in a previous case admitted the fact that they had received Rs. 1,000 as earnest money from the plaintiffs but stated that the sum had been more than repaid by delivery of cotton to the value of Rs. 3,000 it was not an admission of a subsisting liability as to the Rs. 1,000 within the meaning of section 19 of the Indian Limitation Act.

I. L. R. 20 Mad. 239 (1), 25 Mad. L. J. p. 231 (2) and I. L. R. 18 All. 385, per Edge, C. J. (3), referred to.

I. L. R. 33 Cal. 1047 (P. C.) (4), distinguished.

Held also, that a person who claims under section 14 of the Act an exclusion of time during which a former proceeding was pending must prove two things—*first* that he had prosecuted the former proceeding with due diligence and *secondly* that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature and that in this case the plaintiffs could not be said to have prosecuted the previous proceedings with due diligence and that under these circumstances it was unnecessary to consider whether non-joinder of parties comes within the purview of *explanation III* of the section.

19 P. R. 1888 (5), referred to.

Second appeal from the decree of P. D. Agnew, Esquire, Divisional Judge, Gujranwala Division, dated the 29th October 1912.

Oertel, for Appellants.

Rama Nand, for Respondents.

The Judgment of the Court was delivered by—

4th Dec. 1915.

RATTIGAN, J.—The sole question before us on this second appeal from the decree of the Divisional Judge is whether the plaintiffs' suit was barred by limitation on the date of its institution in the Court of the *Munsif*, 1st class. The claim

(1) (1896) *I. L. R. 20 Mad. 239* (*Periavenkan Udaya v. Subramanian Chetti*).

(2) (1913) *25 Mad. L. J. p. 261* (*Sheik Meera Sahib & Co. v. Sheik Naina*).

(3) (1896) *I. L. R. 18 All. 384* (385) (*Hingan Lal v. Mansa Ram*).

(4) (1906) *I. L. R. 33 Cal. 1047* (*P. C.*) (*Maniram Seth v. Seth Rupchand*).

(5) *19 P. R. 1888* (*Ram Chand v. Shadi Ram*).

was based on the allegation that the defendants, 11 in number, agreed by one and the same document, dated 21st Katak Sambat 1964 (*i.e.* 6th November 1907) to sell the whole of their cotton crop of a certain season to the two plaintiffs at a specified rate. The sum of Rs. 1,000 was advanced in two instalments to the defendants who undertook to deliver the crop at the end of the season. One defendant, Arura, admittedly delivered 250 maunds of cotton at the time agreed upon and plaintiffs state that they settled matters with him and have no further cause of action as against him. The other defendants, however, failed to deliver any cotton and plaintiffs accordingly sue to recover Rs. 750 being the balance of the earnest money after allowing 250 maunds delivered by Arura and for interest. The claim was decreed except as regards interest by the *Munsif* against all the defendants but the Divisional Judge on appeal held that the claim was barred as against two of the defendants, Taja and Dula. In all other respects the *Munsif*'s decree was upheld.

It is admitted that the plaintiffs' suit as now brought must be held to be barred by time unless (1) the written statement signed by all the defendants except Taja, Dula and Arura, and filed in two separate suits previously brought by the plaintiffs separately, can be held to contain an acknowledgment of liability within the meaning of section 19 of the Limitation Act, 1903, or (2) the plaintiffs can be held entitled to an extension of time under section 14 of the said Act.

As regards the first point, we are unable to agree with the lower Appellate Court that at the time when the written statement was filed, it contained any acknowledgment of a liability then subsisting. Paragraph 3 recited a past event namely, that Rs. 1,000 had been taken by defendants as earnest money and paragraph 4 proceeded to set out that the said sum had been more than repaid by delivery of cotton to the value of Rs. 3,000. We find it difficult to understand how a statement of this kind can be construed into an admission of then existing liability in respect of the Rs. 1,000. In *I. L. R. 33 Cal. 1047* (1) their Lordships of the Privy Council held that an admission by defendants that a sum of money had been received by them and that there were open and current accounts between their creditor and themselves amounted to an acknowledgment that they were liable to pay the amount received by them if, upon taking accounts, it were found that they were indebted to that extent to the creditor. In the present case

(1) (1906) *I. L. R. 33 Cal. 1017* (P. C.) (*Maniram Seth v. Seth Rupchand*).

there is no admission that open and current accounts were in existence between the plaintiffs and the defendants at the time when the written statement was filed, nor is there any admission from which a liability to pay the sum of Rs. 1,000 can be implied. In our opinion the decisions of the Madras High Court reported in *I. L. R. 20 Mad. 239* (1) and 25 *Madras Law Journal* at page 261 (2) are authorities directly in point and support the view that we take. As observed by Edge, C. J. in *I. L. R. 18 All. 385* (3), if mere recitals of past events are to be construed in cases such as the present into acknowledgments of existing liability, defendants will be exceedingly reluctant to file written statements and will in any case see that they are as bald and as brief as they possibly can be.

We accordingly hold that there is no such acknowledgment of liability in this case on the part of the defendants as to extend the time under the provisions of section 19 of the Limitation Act.

The next question is whether plaintiffs are entitled to an exclusion of time under section 14 of the Indian Limitation Act. Admittedly the contract was made in favour of Mehru Mal and Larka (who are erroneously described by the Divisional Judge as father and son) jointly, but on the 7th of July 1908 Mehru Mal as sole plaintiff sued to recover one-half of the earnest money paid by himself and Larka to the defendants. The latter in the written statement filed by them, took as their first objection the plea that the contract being in favour of Mehru Mal and Larka jointly, it was not competent to Mehru Mal to bring the suit in his own name. Larka when examined stated that he would not join Mehru Mal as a co-plaintiff, but subsequently in November 1910 he brought a separate suit as sole plaintiffs and in it sought to recover the other half of the said earnest money. In his suit also the objection was taken by defendants that Larka could not sue alone in respect of the joint contract but his replication was that the contract was not joint and he refused to implead Mehru Mal as a co-plaintiff. As a result the plaints in both suits were rejected on the ground of non-joinder. Thereafter Mehru Mal and Larka brought the present suit as co-plaintiffs but, as we have pointed out already, the claim had become time-barred before its institution, and the only question which we have now to decide is whether in the circumstances above set forth, plaintiffs can be said to have been prosecuting "with

(1) (1896) *I. L. R. 20 Mad. 239* (*Periavenkan Udaya v. Subramanian Chetti*).

(2) (1913) 25 *Mad. L. J.* p. 231 (*Sriit Meera Sahib & Co. v. Sheik Naina*).

(3) (1896) *I. L. R. 18 All. 331* (335) (*Hijra Lal v. Mura Ram*).

due diligence" another civil proceeding founded on the same cause of action and prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. Upon the view that we take, it is unnecessary to consider whether non-joinder of parties comes within the purview of explanation III of section 14 of the Limitation Act of 1908. In our opinion plaintiffs cannot be said to have prosecuted the previous proceedings with due diligence. In No. 19 P. R. 1888 (1) it was held that plaintiffs cannot be held to have *bona fide* prosecuted a case with due diligence when there was such a palpable flaw in their plaint that it had to be dismissed because it failed to disclose a cause of action and further that the person who claims an exclusion of time during which a former proceeding was pending must prove two things *first*, that he had prosecuted the former proceeding with due diligence and, *secondly*, that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature. In the course of their judgment the learned Judges remarked: "if a plaintiff "rushes into Court with a plaint which discloses no cause of "action, or complains of the infringement of a right which "has not yet accrued to him, and his suit is dismissed in "consequence, he cannot with justice say that it is owing to a "defect of jurisdiction on the part of the Court, or other "cause of a like nature, that it has refused to entertain it. He "has in reality only himself to blame for the unfructuous "result of his litigation, and if he has exhausted the period "of limitation in fighting such a case through a series of "Courts, until he is finally set right by the highest Court "of appeal, he can hardly expect to have his wrong-headedness "accepted as proof of diligence." So in the present case, each plaintiff came into Court originally to sue separately in respect of a contract which gave them a joint but not a several right and their error was pointed out to them and they were given every opportunity of rectifying it. They elected, however, to proceed with their suits as then framed and by the time that those suits were decided the period of limitation had expired. It is impossible to hold in these circumstances that the plaintiffs exhibited that degree of diligence which alone could entitle them to claim the benefit of section 14 of the Act.

We must accordingly hold that the present suit is barred by limitation, and accepting the appeal we dismiss plaintiffs' claim with costs throughout.

Appeal accepted.

No. 42.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

ALLAH DITTA—(DEFENDANT)—APPELLANT,

Versus

SHANKER DAS—(PLAINTIFF)—KUNJ LAL—(DEFENDANT)—
RESPONDENTS.

Civil Appeal No. 1752 of 1912.

Jurisdiction—suit for dissolution of partnership business carried on in the Jammu State—while parties' ancestral home was in the Gurdaspur district, where part of the capital had been subscribed—Indian Contract Act, IX of 1872, section 254 (5) and (6).

Plaintiff and defendant, both of whom had their ancestral home in the Gurdaspur district, entered into a partnership to carry on a shop at Ramkot in the Jammu State. Plaintiff alleging that owing to malversation on the part of defendant it was impossible to carry on the business at a profit, sued at Gurdaspur for dissolution of partnership and rendition of accounts. Part of the capital required to start the partnership was subscribed in the Gurdaspur District.

Held, that as the causes of action, *viz.*, misconduct of his partner and the fact that the business could only be carried on at a loss (*vide* sub-sections 5 and 6 of section 254 of the Indian Contract Act) arose wholly at Ramkot in the Jammu State, the Gurdaspur Court had not jurisdiction to entertain the suit, notwithstanding that part of the capital was subscribed within the limits of its jurisdiction.

Woodroffe and Amir Ali's Civil Procedure Code, pp. 176—180, referred to.

Second appeal from the decree of H. A. Rose, Esquire, Additional Divisional Judge of Amritsar, at Sialkot, dated the 25th July 1912.

Rambhaj Datta, for Appellant.

Bakhshi Sohan Lal, for Respondents.

The Judgment of the Court was delivered by :—

8th Dec. 1915.

LESLIE JONES, J.—The facts of this case are briefly that the plaintiff and defendant, both of whom had their ancestral home in the village of Sukhu Chak in the Gurdaspur District, entered into partnership to carry on a shop at Ramkot in the Jammu State. The plaintiff, alleging that owing to malversation on the part of the defendant it is impossible to carry on the business at a profit, has sued for dissolution of partnership and for rendition of accounts. The suit was instituted in the Court of the Subordinate Judge of Gurdaspur who held that he had no jurisdiction because the cause of action had arisen in the Jammu State. The plaintiff then appealed to the Divisional Judge at Sialkot who reversing the decision of the

Subordinate Judge remanded the suit for decision on its merits. The defendant has now preferred an appeal to this Court.

It appears that a part of the capital required to start the partnership was subscribed by the plaintiff at Sukhu Chak in the Gurdaspur District and it is on this fact alone that the decision of the Divisional Judge is based. He has remarked that it is clear that the case is well within the authority cited in Woodroffe and Amir Ali's Civil Procedure Code, pages 176 to 180, but counsel for the respondent has been unable to show us any ruling cited either there or elsewhere in which it has ever been held that the *forum* for a suit of a dissolution of partnership and rendition of account could be governed by the place in which capital for the partnership is subscribed. The causes of action which the plaintiff sets up in this case are the misconduct of his partner and the fact that the business can only be carried on at a loss—*vide* sub-sections 5 and 6 of section 254 of the Indian Contract Act and those causes of action arose wholly at Ramkot in the Jammu State. In the case of such a suit the place where a part or even the whole of the capital was subscribed appears to us quite immaterial.

Counsel for the plaintiff-respondent has before us advanced a fresh argument that his client's suit can be brought within the jurisdiction of a Court at Gurdaspur by virtue of explanation I to section 20 of Act V of 1908, but there has never been any allegation that the residence of the defendant at Ramkot was of a temporary character and there is no reason for allowing the plaintiff to set up a fresh case now.

We hold therefore that the Subordinate Judge of Gurdaspur had no jurisdiction to hear the suit and accordingly we accept the appeal, set aside the order of the Divisional Judge and restore the decree of the first Court. The defendant-appellant will get costs throughout.

Appeal accepted.

No. 43.

*Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
LeRossignol.*

GULAB KHAN AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

MUSSAMMAT CHIRAGH BIBI AND OTHERS—
(PLAINTIFFS)—DHERU AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 162 of 1912.

*Punjab Limitation Act, I of 1900, Article 1—whether applicable to a suit
for a declaration instituted after the death of the alienor—Custom—Aliena-*

tion—will in favour of mother and mother's brother in presence of near collaterals—Gujars of Gujar Khan Tahsil, Rawalpindi District.

This was a suit brought in 1919 by the near collaterals of one A. D., a Gujar of Gujar Khan Tahsil in the Rawalpindi District for a declaration that the will of A. D. made on 24th December 1899 by which he bequeathed the whole of his property to his mother and his maternal uncle is invalid and will not affect plaintiff's reversionary rights on the death or remarriage of the mother. A. D. died shortly after making this will and mutation was granted in accordance with the provisions of the will, in spite of the objections of the collaterals, on 26th February 1901. The first Court threw the *onus* of proving the invalidity of the will on the plaintiffs and holding that they had not discharged the *onus* dismissed the suit. The Divisional Judge on appeal placed the *onus* of proving the validity of the will on the defendants and holding that defendants had not discharged this *onus* decreed for the plaintiffs. The defendants then appealed to the Chief Court.

Held, that notwithstanding that this suit for a declaration was brought after the death of the alienor the Punjab Limitation Act of 1900, article 1, was applicable to it, and the suit was consequently not barred by limitation.

64 P. R. 1909 (1), referred to.

Held also, that it had not been proved that by custom among Gujars of Gujar Khan Tahsil of the Rawalpindi District a childless proprietor can alienate the whole of his property to his mother and his mother's brother in presence of near collaterals.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 5th November 1911.

Muhammad Shafi, for Appellants.

Nand Lal and Madan Gopal, for Respondents.

The Judgment of the Court was delivered by—

9th Dec. 1915.

LEROSSIGNOL, J.—In this case counsel for the respondents raises a preliminary objection that one Manga, one of the plaintiffs-respondents, has died and that the application to bring his representatives on to the record was not made within six months of his death. Counsel for the appellants admits that he is unable to meet the respondent's objection and he is willing that the appeal so far as Manga is concerned should be held to have abated. Respondents then contended that since the appeal has abated as regards Manga it has also abated so far as the remaining appellants are concerned. For this argument respondents' counsel were unable to find any justification. The suit brought was not based on any joint right, but on the several rights of all the plaintiffs. The suit could have been brought by the other plaintiffs exclusive of Manga and now that Manga retires from the defence of the appeal there is no reason why it should not be continued by plaintiffs who survive. Ghulam Hussain and Niaz Ali, respondents, have died whilst

this appeal has been pending and their representatives have not been brought upon the record in time, but this point is of no importance, for they are *proforma* respondents, and the appeal can proceed without the inclusion of their representatives.

This case is brought by the near collaterals of Allah Ditta, a Gujar of Gujar Khan *Tahsil* in the Rawalpindi District, for a declaration that the will by which the said Allah Ditta on the 24th December 1899 bequeathed the whole of his property to his mother Mussammat Kasim Bi and to his maternal uncle Gulab Khan is invalid and will not affect the plaintiffs' rights on the death or remarriage of Mussammat Kasim Bi. Allah Ditta died shortly after making this will and mutation was granted in accordance with the provisions of the will in spite of the objections of the collaterals on the 26th February 1901. The first Court threw upon the plaintiffs the burden of proving that by custom a sonless Gujar was not competent to make a testamentary disposition of the whole of his property and holding that the plaintiffs had not discharged the burden it dismissed the suit. The Divisional Judge on appeal thought that the *onus* should be placed upon the defendants of proving that such a proprietor was competent in the presence of collaterals to alienate by will the whole of his ancestral property and holding that defendants had not discharged the *onus* he decreed for the plaintiffs.

Before this Court Mr. Shafi for the appellants first contends that the *onus*, should have been laid upon the plaintiffs and urges that if this Court holds that the Divisional Judge has rightly placed the *onus*, still as the *onus* was placed in the original Court upon the plaintiffs a remand should in any case be granted by this Court in the event of the evidence upon the record being held insufficient to establish the defendant's contention.

Next it was urged that the plaintiff's suit was barred by time inasmuch as the Punjab Limitation Act of 1900 does not deal with a suit such as the present which is launched only after the death of the alienor. Mr. Shafi contends that the language of article 1 of the Punjab Limitation Act of 1900 precludes the idea that a suit for a declaration that an alienation shall be void except for the lifetime of the alienor can be brought when that lifetime has come to an end. The matter, however, has been considered in 64 *P. R.* of 1909 (1). The correctness of that judgment is challenged and it is contended that the language of the Limitation Act must be very strictly construed and that if a suit is brought which does not satisfy

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the definition of the article of Limitation which it is sought to apply it must be held that the article does not apply to that suit.

After careful consideration of this matter we see no reason for holding that the decision reported as 64 P. R. of 1909 (1) is incorrect. The intention of the Legislature is very obvious and whatever difficulty arises is due solely to the infelicitous nature of the language used. The suit now before us might be described quite adequately although loosely as a suit for a declaration that the alienation effected by Allah Ditta was void except for his lifetime. But it might just as well be described as a suit for a declaration that the alienation by will should not affect the reversionary rights of the plaintiffs, and that is clearly the intention of the plaintiffs.

They desire a decree declaring that the alienation shall be void against them as soon as they become entitled to the property affected.

We overrule the objection.

The next point is whether the custom on which defendants-appellants rely has been established.

Defendants have produced thirteen instances, not all of the Gujar Khan *Tahsil* however, but we find that they go some way to establish a custom of gift or bequest by Gujars in favour of nephews or (more rarely) sister's sons only.

Even after allowing that tribes in the western part of the Punjab are less restricted in the disposition of their ancestral property than the tribes of the Central Punjab, and after conceding that there appears to be a custom warranting special favours to nephews or sister's sons, we are unable to hold that there exists a custom justifying a gift or bequest of the whole estate to a mother and a mother's brother, who stand in relation to the donor or testator in a very different position from that held by a nephew or a sister's son.

Custom, moreover, is a fact which must be proved by authoritative pronouncement or by instances in which it has been allowed; it cannot be established by dialectics.

We hold then that the custom contended for by the appellant is not established and as defendant-appellants produced a considerable body of evidence before the first Court, we see no probability whatever that a remand would enable them to strengthen their position.

The appeal is dismissed with costs.

Appeal dismissed.

No. 44.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Leslie Jones.*

SANTU—(DEFENDANT)—APPELLANT,

Versus

MUSSAMMAT JOK—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 25 of 1912.

*Custom—succession—collateral succession by widow of adopted son—
Brahmins, Kangra District.*

Held, that plaintiff, the widow of an adopted son, had failed to prove that by custom among Brahmins of the Kangra District she had any right to succeed as an heir to the collaterals of the adoptive father of her late husband.

*Further appeal from the decree of W. A. LeRossignol, Esquire,
Divisional Judge, Hoshiarpur Division, dated the 7th October 1911.*

Tek Chank, for Appellant.

Ram Bhaj Datta, for Respondent.

The Judgment of the Court was delivered by—

RATTIGAN, J.—The pedigree table* of the parties is given in the judgment of the District Judge. Mussammat Jok, the widow of Madho, adopted son of Ganpat, seeks to recover possession of the land which originally belonged to Ghanaya but passed after his death, successively, to his son, Socheta, the latter's widow Mussammat Hiran; and on the death of Mussammat Hiran, to Mussammat Lochnen, widow of Ghanaya. Mussammat Lochnen died in 1909 and on the 13th August of that year the defendant, Santu, who alleged himself to be the son of Socheta, obtained mutation in his favour. Plaintiff's suit was dismissed by the first Court, but, after a remand for further inquiry, was decreed by the Divisional Judge on the ground that Santu had failed to prove that he was the son of Socheta, and that plaintiff, as the widow of Madho, the adoptee, had a preferential right against one who was a mere stranger.

Santu has appealed to this Court and his Counsel not unnaturally lays stress on the fact that the learned Divisional Judge has apparently decided the case on the weakness of defendant's rights rather than on the strength of plaintiff's claim. There is, we consider, force in this contention. We see no reason whatever to differ from the learned Divisional Judge's findings regarding the *status* of Santu. He has appeared in Court before us and we cannot believe that he was born 28 or 29 years ago, or that he can be the son of Socheta who died probably before 1886. We may take it therefore that he is a trespasser without any right of his own to the property. At the same time he has obtained mutation and is in possession of at least half of the property, the other half being in possession

5th May 1915.

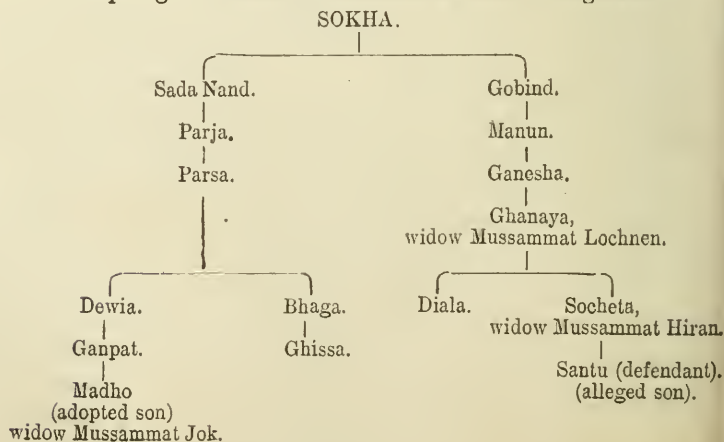
* The pedigree table has been printed at the end of this Judgment.—Ed.

of the mortgagee who appears to have recognised his rights at mutation. Before Santu can be deprived of the property in his possession, plaintiff must prove her right to eject him ; in other words she must prove that the widow of an adopted son is recognised by the custom obtaining among *Brahmins* of the Kangra District, to succeed as an heir to the collaterals of the adoptive father of her late husband. This question of custom was put into issue between the parties (see issues 2 and 3) but plaintiff upon whom the *onus* rested, has entirely failed to discharge the burden of proof. The utmost that can be said is that in 1898 Madho succeeded to the property left by Ghissa. As regards this succession, we have only the mutation entry before us, but it would appear that shortly before the question of the succession to Ghissa arose, Madho had made an effort to oust Mussammat Hiran, Socheta's widow, from the land in her possession on the ground of unchastity. His efforts failed, but it may well be that Mussammat Hiran who was in possession of a large estate, had no desire to re-open the question of her good behaviour by disputing Madho's alleged right to succeed to Ghissa. This instance is therefore of little value, and apart from it, there is no evidence whatsoever in support of the plaintiff's contention that as the widow of Madho, adopted son of Ganpat, she is entitled to succeed, as an heir recognised by custom, to the estate of Ghanaya or Socheta. Every opportunity was given to the parties to prove their case and no good object would be served by remanding the case for further enquiry.

We accordingly accept the appeal and setting aside the decree of the Divisional Judge we dismiss plaintiff's suit with costs throughout.

Appeal accepted.

The pedigree table referred to in the above Judgment.



No. 45.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
LeRossignol.

DEWA SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

LEHNA SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 654 of 1910.

Custom—succession of adopted son to property of his natural father in presence of collaterals—Banias, Tahsil Mukhtsar, district Ferozepore—Riwaj-i-am—Hindu Law.

Held, that an appointed heir retains his right to succeed in his natural family as against collaterals, though he does not succeed in presence of his natural brothers.

Rattigan's Digest of Customary Law, para. 48 referred to.

Entry in *Riwaj-i-am*, opposed to general custom and unsupported by instances held to be insufficient to prove the special custom alleged by the collaterals.

Held further, that even under Hindu Law mere customary appointment of an heir would not debar the adoptee from succeeding to the estate of his natural father.

Further appeal from the decree of S. W. Wilberforce, Esquire, Additional Divisional Judge, Ferozepore Division, dated the 4th April 1910.

Muhammad Shafi, for Appellants.

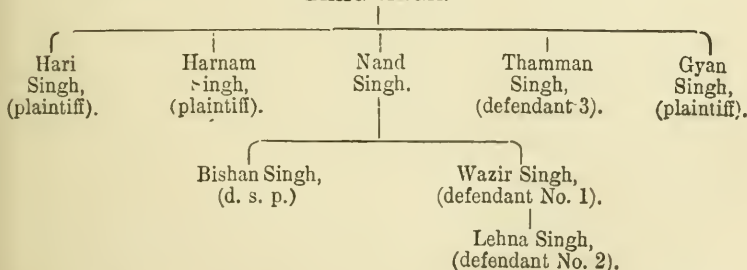
Kirkpatrick, Morton and Dalip Singh, for Respondents.

The Judgment of the Court was delivered by—

CHEVIS, J.—The geneological tree is as follows :—

18th Nov. 1915.

BHAG SINGH.



The dispute is as to the property of the late Nand Singh. Nand Singh's younger son, Wazir Singh was adopted by Thamman Singh. Whether Lehna Singh was alive or not at the time of the adoption is a disputed point. After the adoption of Wazir Singh, Bishen Singh died sonless. Three years later,

in 1908, Nand Singh died. The plaintiffs; *viz.* Gyan Singh and the sons of Hari Singh and Harnam Singh sue for three-fourths of his property, treating Wazir Singh and Lehna Singh as belonging to Thamman Singh's line by reason of Thamman Singh having adopted Wazir Singh.

Wazir Singh and Lehna Singh first put in joint pleas, but a separate guardian was then appointed for Lehna Singh and separate pleas were then put in.

The main plea for Wazir Singh was that he had not lost his right to succeed to his natural father's estate.

Lehna Singh relied mainly on a will made by Nand Singh in his favour.

The first Court decreed the claim, holding that the parties were governed by custom, that Wazir Singh had lost his rights of succession by reason of adoption, that Lehna Singh was not adopted by Nand Singh and that Nand Singh could not make a will in his favour.

Wazir Singh and Lehna Singh jointly appealed to the Divisional Judge, in whose Court a novel line of argument was taken up, *viz.* that Lehna Singh, having been in existence before his father's adoption, remained in his natural family, and so must succeed to his grandfather's estate to the exclusion of the plaintiffs. This argument the Divisional Judge held to be correct, and so he dismissed the suit. The result is that neither defendant was able to appeal to this Court, although the decision of the lower Appellate Court is in favour of Lehna Singh alone, and not in favour of Wazir Singh.

The plaintiffs appeal to this Court, urging that the lower Appellate Court's decision is unsound, that the Lower Appellate Court should not have allowed a new line of defence to be set up, that as a matter of fact Lehna Singh was born after his father's adoption, and that the question of his being born before that adoption and of the effects of his being in existence at the time of the adoption should have been put in issue and the case remanded for further enquiry before any decision in defendant's favour was passed.

There is considerable force in these arguments, but for Lehna Singh it is argued in this Court that, entirely apart from the fact of Lehna Singh's rights being unaffected by his father's adoption, the Lower Appellate Court's order dismissing the suit is correct for the simple reason that Wazir Singh, though adopted, does not lose his rights of succession to his natural father's estate in the absence of other sons of that father.

This is of course an argument in favour of Wazir Singh's succession, but Lehna Singh is entitled to advance any argument which may enable him to prevent the plaintiffs from getting a decree.

The lower Courts have held that Wazir Singh's adoption bars his succession as son of Nand Singh. Their decision is based on a clause in the *Riwaj-i-am* prepared in 1870, which lays down that when a man is adopted and subsequently his brothers die without issue the adoptee succeeds to his natural father's estate only in the absence of brothers or nephews of his natural father.

The *Riwaj-i-am* in question seems to have been prepared with great care for the *banias* of seventeen villages in the Muktsar *tahsil*, and it is obviously a document entitled to considerable respect. Further, as is pointed out to us, it was attested by Nand Singh and Thamman Singh. It is also pointed out to us that Nand Singh himself thought that according to custom the plaintiffs would succeed to his estate, his elder son having died sonless, and his younger son having been adopted, and so he wrote a will in favour of Lehna Singh, in the course of which he mentioned Bishen Singh's death and Wazir Singh's adoption, and said "now I have no sons" (*ab muzhir ke koi aulad sulbi nahin hai*).

But in such cases what we have to see is, what is the real custom, not what the people think to be the custom. People have sometimes very strange and incorrect ideas of their own customs. If the custom alleged in the *Riwaj-i-am* is correct surely there should be some instances in support of it. This is not a case of a formal adoption under Hindu Law; it is a case of appointment of an heir, and the ordinary custom is undoubtedly that laid down in paragraph 48 of Rattigan's Digest, *viz.*, that the appointed heir retains his right to succeed in his natural family as against collaterals, though he does not succeed in presence of his natural brothers. It may well be that he would have to yield also to his brother's sons, or even to his own son assuming that that son was born before his own adoption for appointment (to use the proper term). But it seems clear that in the absence of all other lineal male descendants of the natural father the adoptee succeeds to the exclusion of collaterals of that father; in other words he is preferred to collaterals such as brothers and nephews of his natural father.

In the evidence certain instances have been cited, but on examining them we find that every one of the five instances is in accord with the general custom, every one being a case of an

adoptee being excluded by his own brothers. Not a single instance of an adoptee being excluded by collaterals of the natural father is forthcoming. No doubt it may be said that such instances must be rare, since an only son is not adopted, and in the natural course of events the father, being the older, dies before the sons. But because instances are rare we cannot guess at them. If they are *very* rare, then what becomes of the alleged custom? If such an instance only occurs once in a hundred years, are we to say that any *custom* exists? The fact remains that not a single instance in support of the alleged custom whereby an adoptee is excluded from succeeding to the estate of his natural father by the brothers or nephews of that father is forthcoming, and we have to consider whether the bare statement to that effect in the *Riwaj-i-am* is sufficient. Mr. Muhammad Shafi points out to us that the *Riwaj-i-am* prepared by Mr. Francis at the later settlement goes further and prevents the adoptee from succeeding to his natural father's estate entirely. That is to say, he has to yield not only to uncles and cousins but to all collaterals. We fail to see how this helps the case for the appellants. On the contrary it shews that the *banias* in question have not always been consistent in their version of their own customs. At one settlement we find them so far conforming to usual custom as to admit the adopted son's right to succeed to his natural father's estate, failing other sons, brothers or nephews of that father; at a later settlement we find them preferring all collaterals to the adoptee. Mr. Shafi speaks of this as a development of custom; we should rather regard it as a drifting back to personal law in the ideas of the people concerned.

Then Mr. Shafi argues that if no instance in point can be traced the matter must be decided by personal law, but we fail to see how this helps him. For the personal law simply lays down that an adopted son loses rights of succession in his natural family, but this only refers to cases of formal adoption with due ceremonies as required by Hindu Law. Here, however, we are not dealing with such an adoption, but merely with a case of an appointment of an heir, and the Hindu Law is no bar to succession to the estate of the natural father in such a case. So if Wazir Singh is barred at all, he must be barred by custom. He is not barred by general custom, which as already stated, gives him the preference over all persons not directly descended from his natural father. And as to the alleged special custom we hold the recital in the *Riwaj-i-am*, opposed to general custom and unsupported by instances, insufficient to prove its existence.

The result is that the plaintiff's suit must fail. Whether Wazir Singh or Lehna Singh has the preferential right *inter se* we do not decide. We find Wazir Singh has a better right to succeed than the plaintiffs, and if Lehna Singh has a better right than Wazir Singh *a fortiori* he has a better right than the plaintiffs.

As regards costs we note that Mr. Morton, appearing for Wazir Singh, urges that Wazir Singh's claim having been thrown out in the Lower Appellate Court, his client is merely a *proforma* respondent in this case, and in fact need not have been made a respondent at all. If this be so we fail to see why Wazir Singh went to the expense of engaging counsel to represent him in this Court. He appealed jointly with Lehna Singh to the Lower Appellate Court, and we consider it was quite unnecessary for him to engage separate counsel in this Court.

We uphold the decision of the Divisional Judge dismissing the suit, and dismiss this appeal. The plaintiffs-appellants will pay Lehna Singh's costs in this Court. Wazir Singh will bear his own costs in this Court.

Appeal dismissed.

No. 46.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

ZIADA—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT JOWAI AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1046 of 1913.

Marriage—restitution of conjugal rights—discretionary power of Courts, when not to be exercised.

Held, that the grant of a decree for restitution of conjugal rights is discretionary with the Courts.

And where, as in this case, the girl was a minor at the time of marriage and no consummation had taken place and the husband had allowed her to remain with her parents for at least 8 years after she attained puberty, *Held* that the Lower Appellate Court was right in declining to exercise its discretionary jurisdiction.

215 P. L. R. 1912 (1), 82 P. R. 1903 (2), and 11 Moo. I. A. 551 (3), referred to.

(1) 215 P. L. R. 1912 (*Mussammat Kaluwati v. Bukhan*).

(2) 82 P. R. 1903 (*Dhani v. Narain Singh*).

(3) (1867) 11 Moo. I. A. 551 (*Munshi Bazloor Raheem v. Shumsoonnissa Begam*).

Second appeal from the decree of B. H. Bird, Esquire, Additional Divisional Judge, Shahpur Division, at Lyallpur, dated the 17th of April 1913.

Bahadur Chand, for Appellant.

Tirath Ram, for Respondents.

The Judgment of the Court was delivered by—

11th Dec. 1915.

SHADI LAL, J.—In this suit for the restitution of conjugal rights, the learned Divisional Judge has concurred with the Court of first instance in holding that the factum of the marriage between the appellant Ziada and the respondent Mussammat Jowai has been established, but he has dismissed the suit on the ground that the girl was, at the time of the marriage, a minor, and consequently a decree for restitution should not, in view of 215 P. L. R. 1912 (1) be passed.

The plaintiff has preferred a second appeal to this Court and after hearing arguments on both sides we do not consider that there are adequate grounds for setting aside the decree appealed against. The learned Divisional Judge has not discussed the evidence as to the factum of marriage, but, even accepting the correctness of his decision on that point, we find that the girl was undoubtedly a minor at the time of the marriage which according to the plaintiff took place at least twelve years before suit. It is further clear that the marriage has not been consummated and the girl has never been to the plaintiff's house. It appears that she attained puberty at least eight years ago, and there is no satisfactory explanation to account for her continual residence at her father's house. It may be, as asserted by her, that no marriage, as a matter of fact, took place, but the law of second appeal precludes us from going behind the finding of fact arrived at by the Lower Appellate Court.

The proposition of law is firmly established, and indeed it is not disputed by the learned pleader for the appellant, that the grant of a decree for restitution of conjugal rights is discretionary with the Court (*vide inter alia*, 82 P. R. 1908 (2) and 11 Moore's Indian Appeals page 551 (3)) and considering Mussammat Jowai's minority at the time of the marriage, the fact of its non-consummation, and the plaintiff's neglect in asserting his marital rights we hold that the Lower Appellate

(1) 215 P. L. R. 1912 (*Mussammat Kalawati v. Bukhan*).

(2) 82 P. R. 1908 (*Dhani v. Narain Singh*).

(3) (1867) 11 Moo. I. A. 551 (*Munshee Bazloor Raheem v. Shumsounnissa Begam*).

Court was right in declining, after this lapse of time, to exercise its discretionary jurisdiction.

For these reasons we affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

No. 47.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

KALU KHAN AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

UMDA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1171 of 1913.

Indian Limitation Act, IX of 1908, articles 14 and 120—Limitation—suit for declaration of title to share in shamilat instituted more than a year after Revenue Officer rejected application for partition.

Held, that a suit for a declaration of title to a proportionate share of the shamilat area after a Revenue Officer had rejected plaintiffs' application for partition of the shamilat, is governed by article 120 and not by article 14 of the Limitation Act.

11 P. W. R. 1908 (1), 8 All. W. N. 119 (2) and 9 Cal. L. J. 91 (3), referred to.

Second appeal from the decree of S. S. Harris, Esquire, Divisional Judge, Hissar Division, dated the 25th February 1913.

Raghn Nath Rai, for Appellants.

Kishen Chand, for Respondents.

The Judgment of the Court was delivered by—

SHADI LAL, J —The facts relevant to the points in controversy in this second appeal are simple and may be stated in a few words. The ancestors of the defendants sold a part of their estate by a sale-deed, dated the 29th August 1863 to the plaintiffs' ancestors, and put the latter into possession of the property alienated. They sold the remaining estate to other persons in 1884-85 and left the village. In 1908 the plaintiffs applied for partition of the shamilat and the Revenue Officer rejected their application in 1909. Thereupon they brought

(1) 11 P. W. R. 1908 (*Ahmad v. Karmdad*).

(2) (1888) 8 All. W. N. 119 (*Anup Pandi v. Sadho Pandi*).

(3) (1907) 9 Cal. L. J. 91 (*Sundari Dasya v. Mahomed Zarip*).

the present action in 1912 for a declaration of their title to a proportionate share of the *shamilat* area, and the Courts below have concurred in decreeing this suit.

The defendants have preferred a second appeal to this Court and the first question for determination is whether the suit, not having been instituted within one year from the date of the order refusing partition, is barred under Article 14 of the Limitation Act. Now it is quite clear that the Revenue Officer had no jurisdiction, and did not profess, to decide the question of title which arises in this case and it is futile to urge that the present suit is one for setting aside his order. The learned counsel for the appellants is unable to cite a single authority in support of his contention, and it is abundantly clear that a suit of this kind is governed by Article 120, *vide inter alia*, 11 *Punjab Weekly Reporter* 1908 (1) 8 *All. Weekly Notes* 119 (2) and 9 *Cal. Law Journal* 91 (3).

On the merits we have no hesitation in confirming the decision of the lower Courts. The sale took place nearly fifty years ago, and all the circumstances point to the conclusion that both the parties intended that the *khawat* land with the proportionate share of the *shamilat* should pass to the alienees. The expression used in the deed, *jumla haquq-o-murafiq hai dakhli wa kharji*, appears to be sufficiently wide; and it is manifest that the vendees have all along been receiving a *pro rata* share of the *shamilat* income and that the vendor ceased to have any share therein. As observed above the latter sold the residue of their estate more than twenty-five years ago and left the village altogether. During this long period they have not asserted their title, and in fact their claim against the second set of vendees was rejected by the lower Court in 1190, and the finding then arrived at has not been challenged by them.

In view of the terms of the deed, the subsequent conduct of the parties and other circumstances of the case, we think that the Courts below have rightly decreed the suit. We accordingly uphold the decree of the Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 11 *P. W. R.* 1908 (*Ahmad v. Karamdasi*).

(2) (1888) 8 *All. W. N.* 119 (*Anup Pandi v. Sadho Pandi*).

(3) (1907) 9 *Cal. L. J.* 91 (*Sundari Dasya v. Mohamed Zarip*).

No. 48.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
LeRossignol.

DALIPA AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

RANI SURAJ KAUR—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1212 of 1910.

Custom—Alienation—status of daughter to contest alienations by her mother or step-mother—Dhilon Jats, Ambala District—Res judicata—Civil Procedure Code, Act V of 1908, section 11—"former" suit—several suits decided at same time—strict interpretation.

The plaintiff, a married daughter, on succeeding to her father's estate brought one consolidated suit to contest a large number of alienations made by her mother and step-mother but on the order of the subordinate Judge this original suit became 3, some of the alienations being retained in the original suit while others were excluded from it and formed the subject matter of 2 separate suits, all 3 suits were nevertheless decided by the District Judge by one judgment. One of them being of the jurisdictional value of Rs. 295-5-0 only was taken in appeal to the Divisional Court, which on 14th July 1913 maintained the District Court's decree on the ground *inter alia* that 135 P. R. 1903 (1) was authority for holding that the plaintiff had the right of challenge. This decision was not challenged in second appeal and it was urged for plaintiff that the question as to plaintiff's status to challenge the alienations was *res judicata* for the purposes of this first appeal to the Chief Court by reason of the decision of the first Court and that of the Divisional Court.

Held, that the rights and privileges of a female heir have to be decided on the evidence of each particular case and that plaintiff, a married daughter, who had succeeded to her father's estate had failed to prove that by custom among Dhilon Jats of the Ambala District, she had a right to contest alienations effected by her mother or step-mother.

Civil Appeals No. 1013, 1014 of 1903 (F. B.) (unpublished), referred to.

Held also, that the question of plaintiff's status to challenge the alienations was not *res judicata* by reason of either the decision of the first Court or that of the Divisional Court. Because as the decision of the first Court was given in all 3 suits in one judgment, *i. e.*, at the same time, it could not be held to have been given in a "former" suit within the meaning of section 11 of the Code of Civil Procedure and as regards the decision of the Divisional Judge on appeal, although it was a decision in a former suit, it was not a decision by a Court which was competent to deal with the present suit in appeal. *I. L. R. 27 All. 37 (P. C.)* (1), *I. L. R. 24 Mad. 350* (2), *I. L. R. 33 Cal. 1101* (3), *I. L. R. 33 All. 51 (F. B.)* (4), *I. L. R. 33 All. 151* (5) and *I. L. R. 32 All. Cal. 67* (6), distinguished.

- (1) (1904) *I. L. R. 27 All. 37 (P. C.)* (*Rampal Singh v. Ram Prasad*).
- (2) (1901) *I. L. R. 24 Mad. 350* (*Gururajammah v. Venkata Krishnama Chetti*).
- (3) (1906) *I. L. R. 33 Cal. 1101* (*Mariamnissa Bibi v. Jaynab Bibi*).
- (4) (1910) *I. L. R. 33 All. 51 (F. B.)* (*Zahria v. Debia*).
- (5) (1910) *I. L. R. 33 All. 151* (*Dakhni Din v. Ali Asghar*).
- (6) 1909) *I. L. R. 32 All. 67* (*Beni Madho v. Indar Sahai*).

Held also, differing from 24 Indian Cases 243 (1) that the Court referred to in section 11 of the Code is the original Court subject to the *proviso* that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal has been finally decided.

Held, further, that legal provisions in bar of suit must be strictly interpreted in favour of a suit.

First appeal from the decree of C. F. Ushorne, Esquire, District Judge, Ambala, dated the 15th August 1910.

Muhammad Shafi, Nanak Chand and G. C. Narang, for Appellants.

Beechey, Dharm Das and Beni Pershad, for Respondent.

The Judgment of the Court was delivered by—

13th Dec. 1915.

LEROSSIGNOL, J —By this Court's order of 4th April 1914 the issue "whether among Dhillon Jats of the Ambala District a married daughter, on succeeding to her father's estate, has a right to contest alienations effected by her mother or step-mother," was sent down to the Court below, for further inquiry and finding.

The return to the remand is that no such right has been established.

On behalf of the respondents Mr. Beechey contended that the custom had been established, he admitted that only one instance, that of Mussammat Suraj Kaur printed at paper book E. pages 10—11 had been discovered, in which a female had successfully challenged the alienation of another female, but he pointed to the array of 101 witnesses produced by his clients, and urged that though their testimony merely reflects their opinion, the cumulative effect of their opinion and sentiment on the point was sufficient to justify us in holding that the custom had been established.

As to this argument it is sufficient for us to say that the only adequate proof of a custom is clear evidence that such and such a custom is followed and not merely opinions however numerous that such and such a custom ought to be followed.

A grievance also was made of the fact that the inquiry on remand had been confined to the Ambala District and it was urged that the boundaries of districts are dictated by other than ethnological considerations.

This argument of course has no novelty and we do not imagine that a district boundary is necessarily the line of demarcation between the followers of one custom and the followers

(1) (1914) 24 Indian Cases 243 (*Midnapore Zemindari Co. Ltd., v. Nitya Kali Dasi*).

of another, but experience has taught the lesson that customs do vary among members of the same tribe dwelling in different localities, and the district was taken as the limit for the inquiry, because there is no general tribal custom universally prevalent throughout this Province, and some limit had necessarily to be fixed.

In any case, this was a point which should have been agitated before the Bench which ordered the remand and not at this late stage before this Bench.

We agree with the Court below that the plaintiff-respondent has failed to prove that by custom she is competent to challenge alienations by her female predecessors in title.

Failing to prove a specific custom, Mr. Beechey then argued that he was entitled to fall back upon Hindu Law, that on general principles, also *e. g.*, on the maxim *ubi jus, ibi remedium, i. e.* 'there is no wrong without a remedy.' A female heir is of necessity competent to protect her right against the depredations of an earlier incumbent, who had merely a life interest, and who was bound at her death or remarriage to pass on that estate unimpaired to the next heir. A final plea was that as regards one of the appellants, Gobind Ram, the matter was *res judicata*, inasmuch as in another case between plaintiff and Gobind Ram, the competency of the suit had been decided between plaintiff and Gobind Ram, prior to the decision of this appeal, by the Divisional Court of Ambala, and that Court's judgment was final.

With regard to both these points, we hold that respondent is not entitled to be heard; they are pleas which could and should have been pressed at the first hearing of this case; the order of remand as also the notes of my learned brother who was on the remanding Bench reveal that they were never mentioned, nor indeed does counsel for respondent assert that they were mentioned. We find that the position accepted by the respondents was that they were to fail or succeed according as they did not prove or did prove the alleged custom in the inquiry to be made by the original Court, after remand. Had a right under Hindu Law been specifically pleaded, the result might have been other than it is, but on this we are not called upon to decide; we would note however that in Civil Appeals 1013, 1014 of 1909 of this Court, a Full Bench though pressing invited to do so, refused to lay down any general proposition regarding a female's right to challenge the alienations of an earlier female life incumbent and decided that the rights and privileges of a female heir had to be decided on the evidence of each particular case.

This decision of the Full Bench would preclude us from giving effect to respondents' contention that a right of inheritance must of necessity comprise a right to protect the estate, even if we thought it right to go behind the remand order, a course which as above stated we cannot adopt.

The point of *res judicata* is of interest and for that reason we devote some remarks to it.

The plaintiff originally brought one consolidated suit to contest a large number of alienations, but on the order of the Subordinate Judge, this original suit became three; some of the alienations were retained in the original suit, whilst others were excluded from it and formed the subject matter of two separate suits. All three suits nevertheless were decided by one judgment dated 15th August 1910, and one of them of the jurisdictional value of Rs. 295-5-0 was taken in appeal to the Divisional Court, Ambala, which maintained the District Court's decree on the ground *inter alia* that 135 P. R. of 1908 (1) was authority for holding that the plaintiff did enjoy a right of challenge. The existence of this right does not appear to have been seriously questioned in that Court, where the contest was waged chiefly on the points of necessity, estoppel and limitation. The Divisional Court's confirmation of the first Court's finding is dated 14th July 1913, and was not challenged in second appeal, so that it is final.

Thus, argued respondent, before this Court was called upon to proceed to judgment in this appeal, there was a final decision of a competent Court as between plaintiff and Gobind Ram, regarding the competency of the suit.

27 All. 37 (2) was cited as authority that a status determined in an earlier suit between parties to a subsequent suit was *res judicata* in the subsequent suit, but the question in this case is whether the competency of the suit had been finally decided in a former suit

24 Mad. 350 (3) has been cited as authority for the view that the date of institution of the two suits is not the criterion for determining whether one suit is to be described as the former suit with regard to another suit in which the plea of *res judicata* is raised.

(1) 135 P. R. 1908 (*Maqsd-ul-Nisa v. Kaniz Zohra*).

(2) (1904) I. L. R. 27 All. 37 (P. C.) (*Rampal Singh v. Ram Prasad*).

(3) (1901) I. L. R. 24 Mad. 350 (*Gururajammah v. Venkata Krishnama Chetti*).

Cal. 33, page 1101 (1) also was cited; in that case the Judges differed, but the facts of that case are not at all parallel with those of this case.

In 33 *All.* page 51 (2) there were two cross decrees in only one of which an appeal was preferred. The appeal was held to be barred because the decree not challenged had become final.

The decision at page 151 (3) of the same volume is to the same effect.

In 32 *All.* page 67 (4) it was held that it is the competency of the original Court to entertain the two suits which regulates the application of the rule of *res judicata*, whilst in 24 *I. C.* page 243 (5) it was laid down that the doctrine of *res judicata* does not apply to Courts of first instance only.

None of these judgments is precisely in point here

In this case the 'former' suit cannot refer to the District Judge's decision, for the District Judge's decision was given in all three suits on one day at one time. If the decision which operates as a bar is the Divisional Court's decision, then that decision is a decision in a 'former' suit, but it is not a decision by a Court which could have dealt with this suit in appeal.

With all deference to the views expressed in 24 *I. C.* page 243 (5) we would hold that the Court referred to in section 11 of the Code of 1908 is the original Court, subject to the proviso that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal has been finally decided. This view is confirmed by the language of explanation II to the section.

In this case we hold that there was no 'former' decision of the original Court and the fact that a simultaneous decision was made final by the decision of the Divisional Court, a Court which was not competent to decide this appeal, before this appeal reached the stage of judgment, does not convert the simultaneous decision into a decision in a former suit between plaintiff and Gobind Ram.

Legal provisions in bar of any suit must be strictly interpreted in favour of the suit.

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- (1) (1906) *I. L. R.* 33 *Cal.* 1101 (*Mariamnissa Bibi v. Jaynab Bibi*).
 - (2) (1910) *I. L. R.* 33 *All.* 51 (F. B.) (*Zaharia v. Debia*).
 - (3) (1910) *I. L. R.* 33 *All.* 151 (*Dakhni Din v. Ali Asghar*).
 - (4) (1909) *I. L. R.* 32 *All.* 67 (*Beni Madho v. Indar Sahai*).
 - (5) (1914) 24 *Indian Cases* 243 (*Midnapore Zemindari Co. Ltd. v. Nitya Kali Das*).

As we find that plaintiff has failed to prove the custom upon which she relied we accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

No. 49.

*Before Hon. Mr. Justice Shadi Lal, and
Hon. Mr. Justice Leslie Jones.*

C. BEVAN PETMAN—(PLAINTIFF)—APPELLANT,

Versus

GANESH DAS AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1270 of 1913.

Indian Registration Act, XVI of 1908, section 17—unregistered document transferring half share in a lease of a coal mine and also certain moveable property, plant, etc., in consideration of Rs. 12,500—whether receivable in evidence in regard to the moveable property—collateral purpose.

Defendant No. 2 had obtained from Government a lease of a coal mine for 15 years and in consideration of an advance of Rs. 12,500 transferred to plaintiff one-half share in the lease and also certain moveable property including plant, etc., by a written document whereby it was agreed *inter alia* that if certain representations made by defendant 2 to the plaintiff in regard to the quality of the coal, etc., proved incorrect plaintiff could terminate the arrangement and would be entitled to recover the Rs. 12,500 with interest and that if repayment was not made, he could both sell the moveable property and continue as joint lessee until the advance was recovered and even dispose of his share in the lease of the mine in order to recoup himself. This document was not registered. Subsequently defendant No. 1 attached part of the moveable property conveyed to plaintiff in execution of a decree against defendant No. 2 and thereon plaintiff instituted the present suit for a declaration that the property in question is not liable to attachment or sale.

Held, that as the written document embodied one transaction for one consideration and there was no separate or distinct transaction concerning the moveable property it was not receivable in evidence, being unregistered, even in regard to the moveable property.

68 P. R. 1886 (1), followed.

I. L. R. 15 Mad. 336 (341) (2), referred to.

Held also, that there is a clear difference between the use of a document for a collateral purpose and its use to establish directly title in a part of the property conveyed.

4 Bom. L. R. 883 (3) and 9 Bom. L. R. 393 (4), distinguished.

- (1) 68 P. R. 1886 (*Martha Pool v. Secretary of State for India*).
- (2) (1892) I. L. R. 15 Mad. 336 (341) (*Thandavan v. Valliamma*).
- (3) (1902) 4 Bom. L. R. 883 (*Bachoo v. Khushal Dass*).
- (4) (1907) 9 Bom. L. R. 393 (*Bai Gulabbai v. Shri Datgarji*).

Second appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, dated the 11th April 1913.

B. Bevan Petman, for Appellant.

Labhu Ram, for Respondents.

The Judgment of the Court was delivered by—

LESLIE JONES, J.—Defendant No. 2 obtained from Govern- 13th Dec. 1915.
ment a lease of the Mela Khel coal mine for a period of 15 years. Finding himself in financial difficulties he made certain representations to the plaintiff concerning the quality of the coal, facilities for working the mine, and the value of certain moveable property, including plant, etc., etc., to the plaintiff. The latter while reserving to himself the right to repudiate the bargain in the event of some of the representations proving incorrect agreed to become joint lessee with the defendant No. 2. They then executed a lease by which defendant No. 2 assigned to the plaintiff a half share in the lease obtained from Government in lieu of an advance of Rs. 12,500 which the plaintiff advanced and also conveyed to him the moveable property, including plant, etc., for the same consideration. It was further agreed that if the representations of the defendant No. 2 proved incorrect the assignee could terminate the arrangement and would be entitled to recover the sum of Rs. 12,500 with interest, and that if repayment was not made, he could both sell the moveable property and continue as joint lessee until the advance was recovered, and even dispose of his share in the lease of the mine in order to recoup himself.

This lease was not registered. Subsequently, in execution of a decree against defendant No. 2, defendant No. 1 attached what must be assumed to be a part of the moveable property conveyed to the plaintiff who has instituted the present suit for a declaration that the property in question is not liable to attachment or sale. He obtained a decree in the Court of the District Judge, but on appeal the Divisional Judge dismissed the suit on the ground that as the lease was not registered it was inadmissible in proof of the plaintiff's title to the property in dispute.

The plaintiff has now preferred a second appeal to this Court. The only question before us is whether the lease is admissible for the purpose for which the appellant seeks to employ it. It is no longer urged that the lease as a whole did not require registration, but it is contended that the terms of the agreement as regards the lease of the mine and the conveyance of the moveable property are readily separable and that

accordingly the case does not come within the purview of 68 P. R. of 1886 (1), the ruling on which the Divisional Judge relied.

There are of course numerous rulings in which it has been held that where a document, which as a whole requires registration, contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immoveable property of the value of Rs. 100 or upwards. But the question whether any particular document is so separable is one which depends on the terms of the document, and if in dealing with the question of divisibility we apply the test expounded in 15 Madras 336 (at page 341) (2), one of the principal rulings on which counsel for the appellant relies, we think that the plea of divisibility must fail. It is true that at various places in the body of the document the references to the conveyance of the moveable property and the ensuing rights of the plaintiff are put in separate paragraphs, a point on which counsel for the appellant lays great stress, but such separation of paragraphs is in our opinion immaterial. We must look to the essence of the agreement, and when that is done, we find ourselves unable to hold that there was any separate or distinct transaction concerning the moveable property. If indeed the plaintiff had acquired the moveable property absolutely and for separate consideration that would be a different matter, but here, not only is the consideration the same, but also the future of the moveable property is made dependent on the future of the lease of the mine. It is sufficiently obvious that the plaintiff would never have taken, or contemplated taking, the plant unless at the same time he obtained the lease of the mine, and we have no doubt that the parties themselves regarded the whole transaction as one and indivisible. At all events, that is how we regard the transaction, and we are accordingly unable to distinguish 63 P. R. of 1886 (1).

Counsel for the appellant has a further argument that even if there is but one inseparable transaction, the deed is still admissible for any purpose other than that of creating or extinguishing rights in immoveable property. Most of the rulings which he cited before us related to cases in which the transaction was held to be divisible, and the only two which can be said to be at all relevant to this argument are 4 Bom.

(1) 68 P. R. 1886 (*Martha Pool v. Secretary of State for India*).

(2) (1892) I. L. R. 15 Mad. 336 (311) (*Thandavan v. Valliamma*).

L. R. 883 (1) and 9 *Bom. L. R.* 393 (2). But both of these were cases in which an unregistered document was allowed to be used for a collateral purpose only, and even if we were prepared to dissent from 63 *P. R.* of 1886, (3) and we are not; there is a clear difference between the use of a document for a collateral purpose, and its use to establish directly title in a part of the property conveyed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 50.

Before Hon. Mr. Justice Rattigan.

LADHA SINGH—(INSOLVENT)—APPELLANT,

Versus

BHAG SINGH AND OTHER—(CREDITORS)—
RESPONDENTS.

Civil Appeal No. 2-62 of 1915.

Insolvency—whether Court can refer the proceedings to arbitrators—Provincial Insolvency Act, III of 1907, section 47—Civil Procedure Code Act V of 1908, Schedule II.

Held, that notwithstanding section 47 of the Provincial Insolvency Act the provisions of Schedule II of the Code of Civil Procedure are inapplicable to proceedings under that Act and the Court had therefore no power to refer the whole proceedings to arbitrators to decide whether the petitioner should or should not be declared an insolvent.

88 *P. R.* 1887, per Plowden, J. (4), referred to.

First appeal from the order of Bhai Charat Singh, District Judge, Jhelum, dated the 23rd of December 1912.

Roshan Lal, for Appellant.

Daulat Ram, for Respondent.

The Judgment of the learned Judge was as follows:—

RATTIGAN, J.—One Ladha Singh applied to the District Judge, Jhelum, under the provision of the Provincial Insolvency Act, 1907, to be declared an insolvent and the proceedings took the ordinary course until the 28th June 1912, when the petitioner and his creditors presented a written petition to the Court which runs as follows:—

“ We the parties have nominated the following arbitrators
“ for disposal of the case:—On behalf of Ladha Singh, petitioner,

(1) (1902) 4 *Bom. L. R.* 883 (*Bachoo v. Khalsaddass*).

(2) (1907) 9 *Bom. L. R.* 393 (*Bai Gulabbai v. Shri Datgarji*).

(3) 63 *P. R.* 1886 (*Martha Pool v. Secretary of State for India*).

(4) 88 *P. R.* 1887 (*Simla Bank v. Narpal Rai*).

“Babu Bheri Ram, Pleader of Jhelum, and on behalf of the respondents, Rai Sahib Babu Bishen Das, certificated Mukhtar. We shall abide by the award of the said arbitrators unanimously. In case of difference of opinion between the arbitrators, the Court itself shall appoint an umpire. In that case, too, we the parties shall abide by the award delivered by the umpire.”

Upon this the Court passed the following order :—

“The parties are present. According to the application filed by the parties this case should be made over to the arbitrators specified in the petition for disposal. In case of difference of opinion between the arbitrators the Court itself will appoint an umpire. Award to be filed in Court by the 24th July 1912. The parties should deposit Rs. 32 as arbitrators' fees and As. 8 as process fee in equal half shares.”

The time for filing of award was subsequently enlarged and on the 4th November 1912 the arbitrators filed the following award :—“We the arbitrators made enquiry on the spot. We took down all the evidence produced by the parties. After taking into consideration all the facts, we are of opinion, that Ladha Singh has not proved that he filed this application *bona fide* or that he has separated off his sons in good faith. He has alienated his house in favour of his sons simply with a view to cause loss to his creditors. As a matter of fact, he has alienated all the immoveable property belonging to him in favour of his sons simply with a view to avoid payment of his debts. In our opinion he can pay the debt and does not deserve to be declared an insolvent and our award is to the effect that his petition should be rejected.”

(The application, order of the Court, and award are in vernacular and the above are translations thereof).

The District Judge, on receipt of this award, passed an order (in English) on the 9th December 1912 to the effect that the arbitrators had found that Ladha Singh was in a position to pay his debts and that any objections to the award which Ladha Singh might have should be preferred within 10 days.

Ladha Singh filed an objection in writing taking exception to the conduct of the arbitrators, but his objection was overruled as having “no sense,” and his petition to be declared an insolvent was rejected by the District Judge, by order dated the 23rd December 1912.

An appeal was preferred from this order by Ladha Singh to the then Divisional Judge, but remained pending until the

2nd August 1915 when it was rejected on the ground that the Court had since the institution of the appeal been converted into that of a District Judge and as such had no jurisdiction to entertain and determine it. The memorandum of appeal was accordingly presented to this Court on the 9th August 1915 and the hearing of the appeal took place before me on the 13th instant.

The sole ground urged before me by Mr. Roshan Lal on behalf of the petitioner Ladha Singh, is that the District Judge acted with material irregularity in practically delegating all his functions under the Act to the arbitrators, and in my opinion this contention is well founded. Section 47 of the Provincial Insolvency Act, 1907, no doubt, provides that "subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its original civil jurisdiction," but I cannot read these provisions as enabling the Court when dealing with petitions under the Act, to refer the whole proceedings to arbitrators who are to decide whether the petitioner for insolvency or (in the case of a petition by a creditor) the debtor should or should not be declared an insolvent.

Proceedings under the Act are of a peculiar character and it is only District Courts and Courts specially empowered by the Local Government, with the previous sanction of the Governor-General in Council, that are given jurisdiction to deal with cases under the Act, (section 3), and it would be anomalous if a Court to which a petition is presented, could delegate the whole of its functions under the Act to a person or persons possessing no special qualifications for dealing with those questions of an intricate and peculiar nature that usually arise in such proceedings and ought in the ordinary course of things to be decided by a judicial officer of experience. An officer who occupies the position of a District Judge is to be assumed to have this experience, but it is significant that no Court other than a District Court is to have jurisdiction under the Act unless it has been specially invested with powers under the Act by the Local Government and that even in these cases the previous sanction of the Governor-General in Council is a condition precedent. In No. 88 P. R. 1887 (1), (a case which was decided under the Punjab Laws Act, 1872), Sir Meredyth Plowden expressed the opinion that the provisions of Chapter XXXVII of the Civil Procedure Code which dealt with

(1) 88 P. R. 1887 (*Simla Bank v. Narpal Rai*).

references to arbitration, are not applicable from the very nature of the proceedings "to a proceeding in insolvency as between the "creditors on the one side and the insolvent on the other," and I have no hesitation in adding that the provisions of Schedule II of the Civil Procedure Code now in force are equally inapplicable to proceedings under Act III of 1907. These proceedings require the exercise of judicial discretion and it would, I consider, be acting contrary to the whole spirit of the Act for a Court, which has special jurisdiction thereunder, to delegate its powers and duties to an arbitrator. In the present instance the District Judge practically left the whole case in the hands of the arbitrators and without attempting to adjudicate himself upon the evidence given before them, has accepted their award as sufficient justification for rejecting Ladha Singh's petition. In so doing he has acted with material irregularity and has failed to exercise the jurisdiction vested in him by the Act. I accordingly accept this appeal and setting aside all proceedings in the District Court subsequent to those which took place on the 31st May 1912, I direct the District Judge to proceed with the case from that stage according to law. Respondents must pay petitioner's costs in this Court.

Appeal accepted.

No. 51.

Before Hon. Mr. Justice Rattigan.

MUSSAMMAT BIBI SODHAN AND ANOTHER—
(PLAINTIFFS)—APPELLANTS,

Versus

HARSA SINGH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1598 of 1913.

Hindu Law—Mitakshara—whether daughters of father's brother of last male owner is entitled to inherit the latter's property in absence of all heirs.

Held, that according to the Benares School of Hindu Law females do not succeed to males unless their right of inheritance is expressly recognised by some text in their favour, and the females so recognised are (a) the widow; (2) the daughter; (3) the mother; (4) the father's mother; and (5) the father's father's mother.

Held consequently, that according to the Mitakshara system the plaintiff, a daughter of the deceased male owner's uncle had no possible claim to

succeed as his heir notwithstanding that there were no other heirs to inherit his property.

I. L. R. 16 Cal. 367 (1), 20 P. R. 1906 (2), *Mayne's Hindu Law* (8th edition), p. 748, *Trevelyan's Hindu Law* (1912) p. 350 and *Mulla's Hindu Law*, p. 132, referred to.

I. L. R. 22 All. 338 (3), not approved, as dissented from in *I. L. R.* 28 All. 307 (4).

Second appeal from the decree of A. W. J. Talbot, Esquire, Divisional Judge, Ferozepore Division, dated the 28th June 1913.

Nand Lal and Ralli, for Appellants.

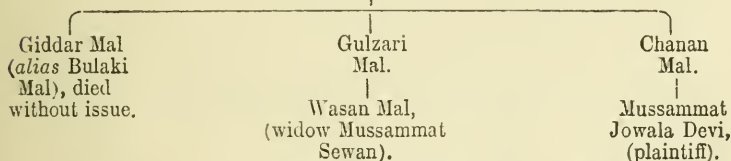
Nanak Chand, for Respondent.

The Judgment of the learned Judge was as follows :—

14th Dec. 1915.

RATTIGAN, J.—Plaintiff, Mussammat Jowala Devi, belongs to an Arora family of Ferozepore, admittedly governed by Hindu Law, and the pedigree table of her family, so far as is material for the purposes of this case, is as subjoined.

DULA MAL.



The property in suit originally belonged to Wasan Mal and was mortgaged, after his death by his widow, Mussammat Sewan, to the defendant. Plaintiff alleging herself to be the legal heir of Wasan Mal, (Mussammat Sewan having died before suit) claims to recover possession of the said property from the defendant. In her plaint she stated that the alleged mortgage in defendant's favour was fictitious and that even if proved to be genuine, was effected for no consideration and without necessity.

Her claim was decreed by the first Court but was "dismissed on defendant's appeal, by the Divisional Judge who held that plaintiff was not entitled under the Hindu Law prevailing in this Province, to inherit from Wasan Mal, her father's cousin, and had therefore no *locus standi* to sue for possession of the property. The Divisional Judge further found that even if plaintiff could maintain the suit, the mortgage was valid and binding upon her.

(1) (1889) *I. L. R.* 16 Cal. 367 (*Jogdamba Koer v. Secretary of State*).

(2) 20 P. R. 1906 (*Mangat Ram v. Devi Chand*).

(3) (1900) *I. L. R.* 22 All. 338 (*Bansidhar v. Ganeshi*).

(4) (1905) *I. L. R.* 28 All. 307 (*Jagan Nath v. Champa*).

From this decree plaintiff has appealed to this Court and the sole question argued before me is as to her right to maintain the suit as an heir to Wasan Mal's property. It is admitted that there are no other heirs and that if plaintiff's claim fails, defendant's possession of the property must continue unless Government prefers a claim thereto on the ground of escheat.

The question then is whether under the Hindu Law of the *mitakshara*, the daughter of the uncle of the last male owner is entitled, in the absence of all other heirs, to inherit the property.

In my opinion, this question must be answered, upon the authorities, in the negative, as it would now appear to be settled law that, according to the Benares School, females do not succeed to *males* unless their right of inheritance is expressly recognised by some text in their favour. Females whose right of inheritance is so recognised are (1) the widow; (2) the daughter; (3) the mother; (4) the father's mother; and (5) the father's father's mother. The daughter of a cousin is nowhere recognised as an heir and whatever may be the law prevailing in the Bombay and Madras Presidencies (where female heirs to males are more favoured than in Bengal and by the Benares School), there can be no doubt that a woman in the position of the present plaintiff has no possible claim to succeed to her father's male cousin according to the *mitakshara* system, (see Mayne's Hindu Law, 8th edition, page 748; Trevelyan's Hindu Law, 1912, page 350; Mulla's Hindu Law, page 132; *I. L. R.* 28 All. 307 (1), *I. L. R.* 16 Cal. 367 (2) and 20 P. R. 1906) (3). In the case last cited a reference was made (at page 78) to a decision of the High Court of Allahabad which was apparently not in accord with earlier decisions of that Court inasmuch as it recognised the right of a daughter's daughter to succeed in the absence of preferential heirs. This case (*Bansidhar v. Ganeshi*, *I. L. R.* 22 All. 338) (4) has been expressly dissented from in *I. L. R.* 23 All. 307 (5) and is, as the learned Judges who decided the later case point out, opposed to a series of Full Bench and other rulings of the same Court. It cannot therefore be regarded as an authority and in any case it would not support the present claim.

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- (1) (1905) *I. L. R.* 28 All. 307 (*Jagan Nath v. Champa*).
 - (2) (1889) *I. L. R.* 16 Cal. 367 (*Jogdamba Koer v. Secretary of State*).
 - (3) 20 P. R. 1906 (*Mangat Ram v. Devi Chand*).
 - (4) (1900) *I. L. R.* 22 All. 338 (*Bansidhar v. Ganeshi*).
 - (5) (1905) *I. L. R.* 23 All. 307 (*Jagan Nath v. Champa*).

I must accordingly hold that plaintiff has no *locus standi* to maintain the present suit as she is not entitled to succeed as an heir to the property of Wasan Mal, and as a result her appeal fails and is dismissed with costs.

Appeal dismissed.

Full Bench.
No. 52.

*Before Hon. Mr. Justice Rattigan, and Hon. Mr. Justice
Shadi Lal and Hon. Mr. Justice Leslie Jones.*

FEROZ DIN AND OTHERS—PLAINTIFFS,

Versus

MUSSAMMAT BASRI AND ANOTHER—
DEFENDANTS.

Civil Reference No. 48 of 1914.

Punjab Alienation of Land Act, XIII of 1900, section 21 A (2) (as amended by Act I of 1907)—power of reference by Deputy Commissioner to Chief Court to have a declaratory Decree of a Civil Court altered to make it consistent with the Act—when to be exercised.

On the death of one G. J. K., a Rajput of the Hoshiarpur district, his landed property was mutated by mutual consent, half in the name of his widow, Mussammat Basri, and half in the names of his three sons by Mussammat Begam, a *Natni* by caste, who claimed to be legitimate sons. Mussammat B. was not a member of an agricultural tribe.

Certain reversioners of G. J. K. appealed to the Settlement Collector who found that the three sons were not legitimate and that mutation should be made in the name of Mussammat Basri alone.

Thereupon the three sons instituted a suit against Mussammat Basri for a declaration that they are sons and heirs of G. J. K. and entitled to half his estate. The reversioners applied to be made parties to the suit which was refused and on confession of judgment by Mussammat Basri plaintiffs obtained a decree. The Deputy Commissioner of Hoshiarpur then filed a revision to the Chief Court under section 21 A (2) of the Alienation of Land Act, as amended by Act I of 1907, on the ground that the decree was contrary to the provisions of that Act and prayed that the declaration in favour of the three sons be modified so as to have effect only during the lifetime of Mussammat Basri.

The questions submitted to the Full Bench were :—

(a) whether a decree which is only a declaration of title can be held to be a decree contrary to any of the provisions of the Alienation of Land Act, and

(b) if that question is answered in the affirmative, this Court must deal with the application upon the existing record or whether if the evidence on the record is not sufficient for the disposal of the application a remand for further inquiry could be ordered.

Held, that a decree even though it be only declaratory, which has the effect of conferring a legal title, when no such title would otherwise exist, may well be contrary to the provisions of the Act.

Held, however, that even if the decree in this case was contrary to the provisions of the Act, the relief prayed for by the Deputy Commissioner would not make it more consistent with it. *Also* that the decree being *in personam* against Mussammat Basri only, would not prejudice the reversioners' rights to sue after the death of Mussammat Basri to have the question of the legitimacy of the three plaintiffs tried.

Held also, that the object of section 21A. is to enable correction of decrees which on the face of the record infringe the provisions of the Act, as *e. g.*, if a Court has granted a decree for possession of land against a *Jat* and a *Sikh* to a person described in the plaint as a *banya* of Lahore city and would not apply to a case like the present where there is a genuine dispute between the parties as to legitimacy.

Held further, that having regard to sub-section 5 of section 21A, the Chief Court has power to order a remand where such an order is necessary.

Case referred by Lala Ganga Ram, Wadhawa, Senior Subordinate Judge, Hoshiarpur, with his No. 787 of 30th November 1914.

Broadway, for Petitioners.

Muhammad Shafi, for Respondents.

The order of the Full Bench was delivered by—

4th Jan. 1916.

LESLIE JONES, J.—On the death of Ghulam Jilani Khan, a Rajput of Garhshanker in the Hoshiarpur District, his property was mutated by mutual agreement, half in the name of his widow Mussammat Basri, and half in the name of Feroz Din, Fazl Muhammad and Ata Muhammad, who claim to be the legitimate sons of the deceased by another lady named Mussammat Begam, a *Natni* by caste, who is not a member of an agricultural tribe.

Objection was taken to the said mutation by certain reversioners of Ghulam Jilani Khan. They preferred an appeal to the Settlement Collector who in a lengthy and elaborate order held that it was not shown that Feroz Din, Fazl Muhammad and Ata Muhammad were the legitimate sons of Ghulam Jilani Khan, and, reversing the first order on that ground, directed that mutation should be made in the name of Mussammat Basri alone.

Thereupon Feroze Din, Fazal Muhammad and Attar Muhammad instituted a suit against Mussammat Basri in the Court of the District Judge of Hoshiarpur for a declaration that they are the sons and heirs of Ghulam Jilani Khan and entitled to hold half his estate. An application by the reversioners to be made parties to the suit was rejected and on confession of judgment by Mussammat Basri, the plaintiffs obtained a decree. An application for the revision of that decree has now been filed by the Deputy Commissioner of Hoshiarpur under section 21 (A) (2) of the Alienation of Land

Act, XIII of 1900, as amended by Punjab Act I of 1907 on the ground that the decree of the District Judge is contrary to the provisions of that Act. The prayer is that the decree be altered so as to make it consistent with the Act, that is to say, "that the declaration be limited to granting the said three sons a half share in the said estate during the lifetime of the said Mussammat Basri," and as there is no evidence on the record that the decree-holders are illegitimate and therefore of the *Nut* tribe, this Court has been asked to order a remand for inquiry into the status of the decree-holders. Curiously enough the decree-holders have not been made respondents.

The case has been referred for the decision of a full Bench on the ground that several important points of law are involved. One of them is the question whether a decree which is only a declaration of title can be held to be a decree contrary to any of the provisions of the Act; and, if that question is answered in the affirmative, a further question whether this Court must deal with the application upon the existing record or whether if the evidence on the record is not sufficient for the disposal of the application a remand for further inquiry should be ordered in such a case.

It appears to us that a decree, even though it be only declaratory, which has the effect of conferring a legal title where no such title would otherwise exist may very well be contrary to the provisions of the Act, and we can easily conceive of such a case; but it is at least open to question whether if the decree under consideration is contrary to the Act, the relief for which the Deputy Commissioner prays would be any more consistent with it. Mussammat Basri is a young woman, and a decree enabling the plaintiffs to hold during her lifetime might secure their possession for a great many years. It is to be remarked, moreover, that the existing decree would produce the same but no greater result. It is a decree *in personam* against Mussammat Basri, and it will not enable the decree holders to hold after her death if the reversioners choose to institute a suit and are able to obtain a finding favourable to themselves on the question of legitimacy.

We will, however, assume that it is still open to the Deputy Commissioner to ask for other and more appropriate relief and if the only objection to the application were the declaratory character of the decree it is not one which would necessarily prevail.

We come now to the prayer for a remand for further inquiry. It appears to us that the intention of the Legislature in framing section 21 (A) was merely to enable the correction of decrees which on the face of the record infringe the provisions of the Act, *e. g.*, if a Court has granted a decree for the possession of land against a Jat Sikh to a person who is described in the plaint as a Banya of Lahore city.

It is, however, laid down in sub-section (5) of section 21 A. that the provisions of the Civil Procedure Code as regards appeals shall apply so far as may be to the procedure of the Court in dealing with such applications, and that being so, this Court has undoubted power to order a remand where such an order is necessary.

Indeed there is certainly one class of cases in which the object of the Act might be completely frustrated unless power to order a remand is exercised. Suppose for instance that A, who is a money-lender and a member of a non-agricultural tribe, comes into Court describing himself as a Jat Sikh and obtains a decree for possession of land against B, who is really a Jat Sikh, but having colluded with A does not expose A's true character and confesses judgment.

In a case of that kind, however, the decree would have been obtained by the practice of fraud on the Court and where such fraud has been practised this Court would exercise its inherent power, even if sub-section (5) did not exist, to take any steps necessary to set aside a decree obtained by such means. If then a Deputy Commissioner were to ask for a further inquiry on an allegation of fraud, this Court would doubtless make the necessary order.

We do not propose to discuss the question whether it is possible that other combinations of facts may not arise which would justify an order of remand on some ground other than that of fraud on a Court, but we are satisfied that if there are such cases this is not one of them.

To return to the facts immediately before us. The application of the Deputy Commissioner does not allege any fraud on the part of the decree-holders and it is clear from the very judgment of the District Judge (who was well aware of the order of the Settlement Collector as regards mutation) that no fraud was practised. The dispute between the decree-holders and the reversioners as to the status of the former is one of a genuine character, and as there is no reason to suppose that the reversioners will drop the contention which they have so eagerly pressed, there is every likelihood that the question of

the status of the decree-holders will be fought out in a contested suit. If it is found that the decree-holders are legitimate, then there can have been no infringement of the Act, and if the contrary is found then the land will be taken by members of an agricultural tribe.

It is impossible to suppose that the Legislature ever intended that section 21 (A) (2) should be used for the purpose of asking this Court to adjudicate on a genuine dispute as to legitimacy and we cannot but regard it as distinctly unfortunate that this case was ever taken up by authority. The objects of the Act are in no jeopardy and the interests involved are purely those of the reversioners, who probably think that the order of the Settlement Collector may be of more use to them in a proceeding of this kind than in a regular suit.

The application fails and is dismissed with costs.

Application rejected.

Full Bench.

No. 53.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge.
Hon. Mr. Justice Chevis, Hon. Mr. Justice Scott-Smith,
Hon. Mr. Justice Shadi Lal, and Hon. Mr. Justice
Le Rossignol.*

ALLAH DITTA—(PLAINTIFF)—APPELLANT,

Versus

NAZAR DIN,—(DEFENDANT)—RESPONDENT.

Civil Appeals Nos. 916 of 1914 and 2682
of 1915.

Mortgage—failure of payment of part of consideration—incomplete transaction—effect on mortgagee's rights—Transfer of Property Act, IV of 1882, section 58.

Held, that the definition of a mortgage given in section 58 of the Transfer of Property Act, *viz.*, that a mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability, should be adopted in the Punjab and should be given its full logical effect.

Held consequently, that in the absence of a covenant or stipulation to the contrary a mortgage is complete or in other words the "transfer of interest" is effected, not when the consideration for it is paid or made good, but when the mortgage contract is entered into, regardless of whether and when the consideration is paid or made good.

Held also, that the covenant or stipulation to the contrary may be express or implied, the question in such cases always being, "when did the parties intend that the transfer of interest should take place?" The presumption would be in favour of immediate transfer, but this presumption could be rebutted by proof of an express stipulation to the contrary or by proof of facts and circumstances from which such contrary intention might reasonably be inferred.

Held further, that the transfer of interest when complete in accordance with the views above stated cannot be rescinded.

And a mortgage of which the whole consideration has not been paid is valid to the extent of the money advanced unless the mortgagor has expressly put an end to the mortgage.

19 Indian Cases 676 (*All.*) (1), and *I. L. R.* 34 *All.* 273 (2), distinguished.

10 Indian Cases 258, (*Mad.*) (3) *I. L. R.* 32 *Mad.* 281 (4) and *I. L. R.* 35 *Mad.* 114 (5) and 18 Indian Cases 610 (*Mad.*) (6).

I. L. R. 29 *Bom.* 46 (7) and *I. L. R.* 31 *Bom.* 552 (8).

10 *Cal. W. N.* 932 (9) and *I. L. R.* 35 *Cal.* 1051 (10), referred to.

132 *P. R.* 1879 (11) and 55 *P. R.* 1911 (12), referred to.

16 *P. R.* 1884 (13), 103 *P. R.* 1906 (14), *C. Rev.* 355 of 1906 per Chitty, J. (unpublished), 26 *P. W. R.* 1908 (15), 66 *P. R.* 1912 (16), 67 *P. R.* 1914 (17) and 31 *P. R.* 1911 (18), commented on and approved generally.

153 *P. R.* 1882 (19), 100 *P. R.* 1889 (20), 1900 *P. L. R.* 401 (21), and 59 *P. R.* 1907 (*F. B.*) (22), disapproved.

Second appeal from the decree of A. E. Martineau, Esquire, Additional Divisional Judge, Amritsar Division, at Gurdaspur, dated the 14th March 1914, and from the decree of R. S. Lala Bishambar Dayal, District Judge, Karnal, dated 28th April 1915.

Muhammad Din, for Appellant.

B. D. Kureshi, for Respondent.

The Judgments of the learned Judges were as follows :—

1st March 1916.

SIR DONALD JORNSTONE, C. J.—In these two cases—Civil Appeal No. 916 of 1914 and Civil Appeal No. 2682 of 1915—the

- (1) (1913) 19 Indian Cases 676 (*All.*) *Hakim Ali Khan v. Dalip Singh*).
- (2) (1912) *I. L. R.* 34 *All.* 273 (*Rashik Lal v. Ram Narain*).
- (3) (1911) 10 Indian Cases 258 (*Mad.*) (*Subbaraya Reddi v. Manikka Koundan*).
- (4) (1908) *I. L. R.* 32 *Mad.* 281 (*Srinivasaswami v. Athmarama*).
- (5) (1910) *I. L. R.* 35 *Mad.* 114 (*Rajai Tirumal Raghu v. Randla Muthial*).
- (6) (1912) 18 Indian Cases 610 (*Sundara Reddiar v. Subbiah Koundan*).
- (7) (1904) *I. L. R.* 29 *Bom.* 46 (*Motichand Jivraj v. Sagun Jethi Ram*).
- (8) (1907) *I. L. R.* 31 *Bom.* 552 (*Bhagabai v. Narayan Gopal*).
- (9) (1906) 10 *Cal. W. N.* 932 (*Munshi Bajrangji v. Udit Narayan Singh*).
- (10) (1908) *I. L. R.* 35 *Cal.* 1051 (*Rajani Kumar Das v. Gaur Kishore*).
- (11) 132 *P. R.* 1879 (*Abbas Ali Shah v. Pir Bakhsh*).
- (12) 55 *P. R.* 1911 (*Musst. Bhagan v. Allah Ditta*).
- (13) 16 *P. R.* 1884 (*Gomess v. Mela Ram*).
- (14) 103 *P. R.* 1906 (*Saudagar Singh v. Sant Ram*).
- (15) 26 *P. W. R.* 1908 (*Mangladha v. Lal Chand*).
- (16) 66 *P. R.* 1912 (*Kiman v. Sultani Mal*).
- (17) 67 *P. R.* 1914 (*Muni Lal v. Chatter Singh*).
- (18) 31 *P. R.* 1911 (*Karam Chand v. Mussakmat Basant Kaur*).
- (19) 153 *P. R.* 1882 (*Allah Bakhsh v. Shama*).
- (20) 100 *P. R.* 1889 (*Gopal Sahai v. Hussain Bibi*).
- (21) 1900 *P. L. R.* 401 (*Gopi Chand v. Sardar Khan*).
- (22) 59 *P. R.* 1907 (*F. B.*) (*Gokal Chand v. Rahman*).

main question to be answered is substantially the same, and in both cases the Judges concerned were of opinion, in view of the unsatisfactory state of the authorities, that it was necessary to secure a pronouncement from a Full Bench of five Judges.

We have heard the aforesaid question argued for both cases together and are ready to lay down principles for future guidance. We have not gone into the facts of the two cases for ourselves on this occasion, but have taken them as stated in the two referring orders, necessary extracts from which I now transcribe here :—

Civil Appeal No. 916 of 1914.

“The claim is based on a mortgage-deed for Rs. 270 executed on 1st January 1909 by defendant 5 in favour of plaintiff, and it is for possession of the mortgaged land. There were three items making up the total of Rs. 270, and of these we have only to consider one, *viz.* Rs. 140 due to a previous mortgagee, Nabi Bakhsh, the sum being left with plaintiff for payment to him. The suit was brought on 20th February 1912, *i. e.* 26 months and 20 days later, and up to that time plaintiff had not paid off Nabi Bakhsh. On account of this non-payment the Lower Appellate Court, dissenting from the first Court, and following 59 *P. R.* 1907 (*F. B.*) (1), has dismissed plaintiff's suit. Plaintiff has filed this second appeal and urges that the ruling quoted does not apply especially as plaintiff took upon himself the liability for the previous mortgage money.” In ground 3 he also suggests estoppel against respondent, but this has not been noticed in argument. The sole question for decision therefore is, whether the mortgage in favour of plaintiff fails and cannot be enforced by him because he had not, up to date of his suit, paid off the previous mortgagee, Nabi Bakhsh.”

Civil Appeal No. 2682 of 1915.

“This is a suit for possession of 14 *bighas* 2 *biswas* of land and for a declaration that plaintiff holds it as security for Rs. 1,422.

“In 1898 the land was mortgaged to plaintiff with possession in Rs. 800, of which Rs. 500 were left with him to redeem an earlier mortgage of Rs. 500 in favour of Salig and Kunja.

“Plaintiff, however, did not redeem Salig and Kunja's prior mortgage, apparently because they had a second mortgage, which raised the amount secured to them on the land to some sum exceeding Rs. 500.

(1) 59 *P. R.* 1907 (*F. B.*) (*Gokal Chand v. Rahman*).

"Next, the mortgagor sold 9 *bighas* out of the mortgaged area to Amin Chand for Rs. 1,025 and Amin Chand deposited with the Deputy Commissioner for payment to Salig and Kunja Rs. 834, whereupon plaintiff paid Salig and Kunja Rs. 834 also. Plaintiff now sues for possession; the Courts below have dismissed his suit on the ground that he failed to fulfil the conditions of his contract by not redeeming the prior mortgage within a reasonable time.

"I am desired to refer the case to a Full Bench on the ground that the same point is involved in this case as in Civil Appeal No. 916 of 1914; the cases are almost parallel, for even if plaintiff had fulfilled his contract, and, I understand, he was willing to do so, the prior mortgagees would not have released the land on receipt of Rs. 500 only.

"So far as I am aware, there is no evidence of demand on the part of the mortgagor, and it seems to me inequitable that plaintiff should lose his security for Rs. 300 advanced by him, merely because the mortgagor had understated the amount of the prior incumbrances on the land.

"The defendant-vendee purchased the land subject to any encumbrance created by his vendor."

I think it will be most convenient to state as simply as I can the general principles I have arrived at, and then to explain the road by which I have travelled, incidentally pointing out, where necessary, what seem to me to be errors in some of the rulings frequently quoted in this Court.

Musst Bhagan v. Allah Ditta
A sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised (section 54, Transfer of Property Act). This is statute law for the greater part of India, and has always been recognized as the law for the Punjab; and it implies that, in the absence of a covenant to the contrary, title passes to the vendee at the time when the contract of sale is made, regardless of whether or when the price is actually paid (*cf.* 55 *P. R.* 1911) (1).

A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability (section 53, Transfer of Property Act).

This also is statute law for the greater part of India, though not for this Province; and in my opinion, just as many,

perhaps most, of the provisions of the Transfer of Property Act have been recognized as good law for the Punjab, this provision should also be unreservedly adopted by us and should be given its full logical effect. It connotes a consequence on the same lines as that stated above in the case of sales; that is to say in the absence of a covenant or stipulation to the contrary, a mortgage is complete, or in other words the "transfer of interest" is effected, not when the consideration for it is paid or made good but when the mortgage contract is entered into, regardless of whether and when the consideration is paid or made good. Lastly, the covenant or stipulation to the contrary may be express or implied, the question in such cases always being—when did the parties intend that the "transfer of interest" should take place. The presumption would be in favour of immediate transfer; but this presumption could be rebutted by proof of an express stipulation to the contrary, or by proof of facts and circumstances from which such a contrary intention might reasonably be inferred. It is impossible to lay down any hard and fast rules for the drawing of such inferences.

A large number of rulings have been cited before us in argument. Those of the High Courts appear to me to be substantially in accord; but there is some inconsistency in the pronouncements of this Court.

Of the two Allahabad cases cited by Mr Sewa Ram Singh the later one, *Hakim Ali Khan v. Dalip Singh* 19 I. O 676 (1913) (1) seems to me hardly in point; for there the mortgagor, having, on default by his second mortgagee, paid off the first creditor, sued the second mortgagee for recovery of the amount so paid, thus shewing that he *elected* to keep the second mortgage alive. The earlier Allahabad ruling, however, is very much in point, namely *Rashik Lal v. Ram Narain*, I. L. R. 34 All. 273 (2). Both the Judges, see pages 278 and 280,—pointed out that the Punjab Judges responsible for 59 P. R. 1907 (F. B.) (3) seemed to have lost sight of the distinction between a transfer of property or of an interest in property and a *contract*; and they adopt the view that where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee, the fact that part of the mortgage money has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option. In drawing this distinction between a transfer and a contract, I do not take it that the learned Judges meant to imply that, when a mortgage is made, the

(1) (1913) 19 Indian Cases 676 (All.) (*Hakim Ali Khan v. Dalip Singh*).

(2) (1912) I. L. R. 34 All. 273 (*Rashik Lal v. Ram Narain*).

(3) 59 P. R. 1907 (F. B.) (*Gokal Chand v. Rahman*).

parties do not enter into a contract. This they undoubtedly do : what was meant is that a mortgage is ordinarily a contract completed at time of execution and not one liable to rescission.

Four Madras cases are deserving of notice, namely : *Subbaraya Reddi v. Manikka Koundan*, 10, *Indian Cases*, 258 (1), *Srinivasaswami Aiyangar v. Athmarama Aiyar*, I. L. R. 32 Mad. 281 (2), *Rajai Tirumal Ragu v. Pandla Muthial Naidu*, I. L. R. 35 Mad. 114 (3), *Sundara Reddiar v. Subbiah Koundan*, 18 I. C. 610 (4).

The first and third of these rulings were cited in connection with a secondary contention of Mr. Sewa Ram Singh's, who contended (1) that "transfer of interest" having taken place at time of mortgage, no question of rescission or failure of mortgage contract arose ; (2) that, if it was taken that there was a contract which could be rescinded by the mortgagor on breach of promise by mortgagee, then section 39, Contract Act, required that there should be a positive act of rescission by the mortgagor at the proper time. In the view I take of the matter as stated above, this secondary contention is unnecessary ; for in my opinion the "transfer of interest," when complete in accordance with the views I have stated, cannot be "rescinded." From these two rulings, further, the principle can be derived that a mortgage, of which the whole consideration has not been paid, is valid to the extent of the money advanced, unless the mortgagor has expressly put an end to the mortgage.

The second Madras case, to be found in volume 32, Indian Law Reports, contains a passage which may usefully be quoted here :—

"The contention that the mortgage to Amba Boi never "came into force is clearly unsustainable. The mortgage is "evidenced by a registered mortgage-deed, and possession passed "thereunder to Amba Boi. There is no provision in the deed "that the mortgage should come into operation only on the payment of the whole sum of Rs. 65,000 which Amba Boi agreed "to advance. The further contention that the mortgage, even if "it did come into operation, no longer subsists, must also fail. "The registered mortgage-deed has not been cancelled by any "registered instrument, and evidence of any oral agreement to "rescind it is shut out by section 92 (4) of the Evidence Act."

The first part of this is fully in accord with the principles I have stated at the beginning of this judgment. I have quoted

- (1) (1911) 10 *Indian Cases* 258 (Mad.) (*Subbaraya Reddi v. Manikka Koundan*).
- (2) (1908) I. L. R. 32 Mad. 281 (*Srinivasaswami v. Athmarama*).
- (3) (1910) I. L. R. 35 Mad. 114 (*Rajai Tirumal Ragu v. Pandla Muthial*).
- (4) (1912) 18 *Indian Cases* 610 (Mad.) (*Sundara Reddiar v. Subbiah Koundan*).

the last two sentences in order to bring in the warning that in the cases argued before us there is no question of mortgages completed and alleged to have been subsequently rescinded by an oral agreement; the question is simply whether in all the circumstances the mortgages ever reached full completion at all.

The last of the Madras Cases (18 I.C. 610) (1) is only indirectly in point: it shews by implication that a mortgage is valid in proportion to the amount of consideration actually paid and that it does not cease to be a mortgage merely because the whole has not been paid.

The two Bombay Cases cited before us appear to me to be very useful. In *I. L. R. 29 Bom. 46* (2)—Moti Chand's case—it was held that it was clear from the terms of the plaintiff's deed, a mortgage of land for Rs. 1,300, whereof Rs. 775 was past debts and Rs. 525 was to be paid in cash, that legally the mortgage therein contained began to operate from the date of the document; that is, in other words, it was not a document which merely created a right to demand another document; but one which itself created as between the parties a charge in the nature of a mortgage; also that the non-payment of the Rs. 525 by the plaintiff could not affect the nature of the document itself or vary its terms, defendant could sue to recover the unpaid remainder or for damages. Again, in *I. L. R. 31 Bombay 552—Bhagabai v. Narayan Gopal* (3) where only part of the consideration for a mortgage had in fact been made good, it was recognized that the mortgage was nevertheless *pro tanto* valid and operative.

The Calcutta Cases are very clear—*Munshi Bajrangji Sahai v. Udit Narain Singh*, 10 C. W. N. 932 (4), *Rajani Kumar Das v. Gaur Kishore Saha*, *I. L. R. 25 Cal. 1051* (5).

In the former it was laid down that a mortgage does not cease to be enforceable because a part only of the money mentioned in the deed has been advanced; and that, there being no suggestion that the mortgagor had cancelled the mortgage or had power to do so, the mortgagee was entitled to a decree for foreclosure upon the footing of the money actually advanced. It is unnecessary to go into detail regarding the somewhat unusual facts of the other Calcutta case. It is enough to say that from it also is deducible the principle that a mortgage may be valid and enforceable for the part of the consideration that has been made good.

(1) (1912) 18 Indian Cases 610 (*Sundara Reddiar v. Subbiah Koundan*).

(2) (1904) *I. L. R. 29 Bom. 46* (*Moti Chand Jivraj v. Sagun Jethi Ram*).

(3) (1907) *I. L. R. 31 Bom. 552* (*Bhagabai v. Narayan Gopal*).

(4) (1906) 10 Cal. W. N. 932 (*Munshi Bajrangji Sahai v. Udit Narain Singh*).

(5) (1908) *I. L. R. 35 Cal. 1051* (*Rajani Kumar Das v. Gaur Kishore*).

It is upon examination of these High Court rulings and the provisions of the Transfer of Property Act that I have arrived at the principles stated early in this judgment, and it remains to see how those principles conflict or agree with the law as set forth in past rulings of this Court.

These are, in chronological order:—

- 132 *P. R.* 1879 ; (1)
- 153 *P. R.* 1882 ; (2)
- 16 *P. R.* 1884 ; (3)
- 100 *P. R.* 1889 ; (4)
- P. L. R.* 1900, p. 401 ; (5)
- 103 *P. R.* 1906 ; (6)
- C. Revision* 355 of 1906 (unpublished) ;
- 59 *P. R.* 1907 (*F. B.*) ; (7)
- 26 *P. W. R.* 1908 ; (8)
- 55 *P. R.* 1911 ; (9)
- 66 *P. R.* 1912 ; (10)
- 67 *P. R.* 1914 ; (11)

Of these the ruling that has given rise to the present references is that of 1907 ; but it is convenient to take each and every case in turn and, where necessary, pronounce upon it. 132 *P. R.* 1879 (1) states the well-known rule in regard to sales set forth at the beginning of this judgment on the authority of section 54, Transfer of Property Act, and I need say nothing more about it. 55 *P. R.* 1911 (9) again states that rule as to sales, but further lays it down that the “subsequent conduct of the parties” to a sale is relevant in order to shew whether they intended ownership to pass at once or only on payment of the consideration. This latter principle, it seems to me, would hold good equally in the case of a mortgage.

All the other cases deal with mortgages. In 153 *P. R.* 1882 (12) Rattigan and Elsmie, JJ. refused to apply to mortgages the rule applied to sales in the 1879 case. They said that, while a sale was complete, in the absence of contrary stipulation, upon execution and registration of the deed, these acts vesting the property absolutely in the vendee, a mortgage

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- (1) 132 *P. R.* 1879 (*Abbas Ali Shah v. Pir Bakhsh*).
 - (2) 153 *P. R.* 1882 (*Allah Bakhsh v. Shama*).
 - (3) 16 *P. R.* 1884 (*Gomess v. Mela Ram*).
 - (4) 100 *P. R.* 1889 (*Gopal Sahai v. Mussammata Hussain Bibi*).
 - (5) 1900 *P. L. R.* 401 (*Gopi Chand v. Sardar Khan*).
 - (6) 103 *P. R.* 1906 (*Saudagar Singh v. Sant Ram*).
 - (7) 59 *P. R.* 1907 (*F. B.*) (*Gokal Chand v. Rahman*).
 - (8) 26 *P. W. R.* 1908 (*Mangladha v. Lal Chand*).
 - (9) 55 *P. R.* 1911 (*Mussammata Bhagan v. Allah Ditta*).
 - (10) 66 *P. R.* 1912 (*Kimani v. Sultani Mal*).
 - (11) 67 *P. R.* 1914 (*Muni Lal v. Chatter Singh*).
 - (12) 153 *P. R.* 1882 (*Allah Bakhsh v. Shama*).

creates a mere accessory right arising out of and dependent upon the loan or debt which is to be secured upon it, and consequently, where the consideration for the mortgage is not paid as agreed upon, the mortgage itself is non-existent," the authority for this being a passage in Justinian. If the guide for us in India were Roman Law, this decision would probably be sound; but I think we should rather follow section 58, Transfer of Property Act, in which, as set forth above, mortgage is looked at in a light very different from that in which the ancient Romans viewed it.

This case was noticed in 16 *P. R.* 1884 (Plowden and Elsmie, JJ.) (1). There A, being urgently in need of money, mortgaged property to B for Rs. 3,500 and ten days later, having received only Rs. 100 mortgaged the same property to C. B. sued for possession, tendering Rs. 3,400; and both learned Judges held that B must have a decree. Plowden, J. said that the answer of A that B knew the money was urgently wanted and promised to pay it promptly and failed to do so, "was no sort of answer to B's claim;" that A could not treat the mortgage to B as null and void owing to the default in payment; that that mortgage still subsisted, the only consequence of non-payment by B being that A would have a right to sue B for damages; and that B must have a decree for possession subject to the condition, that the decree should not be executed except upon payment into Court by him of Rs. 3,400; Elsmie, J. concurred in the order passed, but put the matter in rather a different way. He distinguished 153 *P. R.* 1882 (2) noting that in the earlier case no tender of payment had been made in the plaint, while here tender had been made within what was *prima facie* a reasonable time. It seems to me that Plowden, J. went out of his way in throwing out the suggestion about a suit for damages; but apart from this I am inclined to hold that Plowden, J.'s views are correct, and there can be little doubt that he considered 153 *P. R.* 1882 unsound. It appears to me that Elsmie, J., on the other hand, if his judgment be read between the lines, seemed inclined to think that that ruling on its own peculiar facts was correct enough.

In the next case I shall notice, 100 *P. R.* 1889 (3), the rulings of 1882 (2) and 1884 (1) (and also one of 1886, much on the same lines as that of 1882) were discussed, and distinguished, it being held (by Powell and Frizelle, JJ.) that they

(1) 16 *P. R.* 1884 (*Gomess v. Mela Ram*).

(2) 153 *P. R.* 1882 (*Allah Bakhsh v. Shama*).

(3) 100 *P. R.* 1889 (*Gopal Sahai v. Hussain Bibi*).

were not in conflict. Briefly stated the facts were that A mortgaged without possession land and houses to B ; that at registration A admitted receipt of only part of the consideration ; that later on A offered to repay that part with interest but B declined the offer ; and that B then sued for recovery of the whole consideration *plus* interest by enforcement of lien against the property. It was held that there never was a completed mortgage, that the transaction fell through from the first, and that B had no right to enforce any lien even in respect of the sum admitted by A, because the contract was for the whole sum and not for any less sum. The discussion in the judgment shews that the learned Judges took the matter to be one of a *contract*, which was not complete until full consideration had passed. The ruling of 1884 (1) was distinguished as dealing with a case of mortgage *with possession* in which tender was made of the balance unpaid ; and it was held that “the rule explained in No. 153 of 1882 (2) Punjab Record,” clearly applied. It appears, then, that the *dictum* quoted above—a mortgage “creates a mere accessory right, etc.” was endorsed ; and thus the remarks I have made regarding the 1882 case apply here also.

The unreported ruling *Gopi Chand v. Sardar Khan*, printed at page 401 of the Punjab Law Reporter for 1900 (3), was written by a Judge (Harris, J.) sitting alone. He held that where part of the mortgage-money stated in a registered deed was unpaid and the mortgagee sued for possession without offering to pay up the deficiency, the claim failed, although plaintiff applied that the decree be passed subject to his paying up that deficiency. 16 *P. R.* 1884 (1) was distinguished on the ground that there the mortgage was with possession and here it was not, and that plaintiff did not come into Court with the deficient sum to pay to defendant. The former distinction is obscure, as the plaintiff in this case, so Mr. Justice Harris’s judgment says, had claimed possession “under the terms of the deed” ; but however this may be, it seems clear that the principle that a mortgage is a *transfer* of an interest was lost sight of.

In the next case, 103 *P. R.* 1906 (4) the aforesaid ruling of 1882 (2) was approved thus—“In the first place the mortgage contract never came into existence owing to non-payment

(1) 16 *P. R.* 1884 (*Gomess v. Mela Ram*).

(2) 153 *P. R.* 1882 (*Allah Bakhsh v. Shama*).

(3) 1900 *P. L. R.* 401 (*Gopi Chand v. Sardar Khan*).

(4) 103 *P. R.* 1906 (*Saudagar Singh v. Sant Ram*).

of consideration money as agreed, *Allah Bakhsh v. Shama*" (153 P. R. 1882) ; but the remark was also made—" I therefore hold that immediate redemption or redemption within a reasonably short period was intended by the terms agreed upon by the parties and that the mortgage transaction as agreed to was never completed owing to plaintiff's failure to fulfil his part of the engagement." If this meant that there was an implied agreement that the transfer of interest should not take place until plaintiff had redeemed from the previous mortgagee and that such redemption should be prompt, the decision seems to me sound enough ; but I should hesitate to endorse the decision if the meaning was that a mortgage is essentially a contract dependent for its completion upon payment of full consideration, or that a mortgage can be " put an end to "—to use a phrase employed in the judgment—*merely* because mortgagee had failed to pay up.

The unpublished Civil Revision 355 of 1906 *per* Chitty, J. can be conveniently dealt with in discussing 59 P. R. 1907 (F B.) (1). The facts in the latter case were stated as below by Chatterji, J., in his referring order, the question for discussion being thus put in the report—to determine whether a mortgage with possession, where for some reason or other a portion of the consideration money specified in the deed remains unpaid, is capable of enforcement and carries lien with it :—

" In this case the consideration for the mortgage dated 9th April 1900, was mostly money to be paid to previous mortgagees and creditors. One of these items was a sum of Rs. 93 payable to Channan Shah. All the mortgage money was paid, but Channan Shah's debt, which was secured by two deeds, could not be paid in full. One deed for Rs. 68 was paid off and the remaining amount in the mortgagee's hands, Rs. 25 was insufficient to redeem the other mortgage. The money remained with the mortgagees and now they sue after the lapse of about five years for possession of the land under the terms of the deed, offering, if necessary, to pay the 25 rupees to the mortgagees."

The learned Chief Judge wrote the principal judgment and discussed the cases of 1882, 1884, 1886, 1889 and 1906, and the Civil Revision aforesaid (judgment by Chitty, J.). The rulings of 1884 and of Chitty J., were dissented from, while the other authorities were approved. Chitty, J., had ruled that a mortgagor could not plead that a mortgage was incomplete merely because prior incumbrances had not been paid off and

he had himself paid some of them ; and had distinguished 100 P. R. 1889 (1) by pointing out that in the case before him the monies to be paid to prior incumbrancers were not to pass through the mortgagor's hands and that no time was fixed for these payments. The learned Chief Judge envisaged mortgages as *contracts*, not as *transfers of interests*, and laid it down that, whether the mortgagee was to pay money to the mortgagor himself or to prior mortgagees, "failure to pay promptly avoids the mortgage," and he ended with the following *dictum* as his answer to the reference :—

"Delay in payment, either to the mortgagor or to a prior incumbrancer, after such payment has been demanded by the mortgagor, avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration, in the absence of a specific contract postponing payment, it being immaterial whether the delay has or has not caused inconvenience or loss to the mortgagor."

As already explained this way of looking at the matter seems to me hardly correct ; and the remark regarding demand by the mortgagor seems to import into the *dictum* an element not contemplated in the statement of facts in the referring order.

Robertson, J., agreed in this reply to the reference, saying that where a certain portion of the money is left with the mortgagee "for prompt payment to a third person" failure to pay such sum within a reasonable or specified time avoids the mortgage. If the learned Judge had added after "third person" the words "and there was an express or implied agreement that the *transfer of interest* should not take place until such payment had been made" the proposition might perhaps be accepted.

The third Judge of the Full Bench (Lal Chand) stated two rules :—

(1) Failure to pay consideration as agreed upon whether to the mortgagor or a prior incumbrancer avoids the mortgage ;

(2) In the absence of any *express and direct stipulation* in the deed of mortgage postponing payment for a *specified time*, it should be presumed that payment was intended to be made immediately or within a reasonable time.

Here again mortgages are treated as contracts and not according to the definition in the Transfer of Property Act.

(1) 100 P. R. 1889 (*Gopal Sahai v. Hussain Bibi*).

The unreported case *Mangladha v. Lal Chand*, to be found at No. 26 *P. W. R.* 1908 (1) does not carry us far, but is in accord with the rule I would like to lay down. It distinguishes the Full Bench ruling of 1907 (2) as also does the next ruling, 66 *P. R.* 1912 (3) in which case it was pointed out that the mortgagor had, by his conduct in continuing to pay interest, notwithstanding the failure of the mortgagee to make good the full consideration, kept the mortgage alive. The Judges in that case (Johnstone and Rattigan, JJ.) merely distinguished the Full Bench case, and therefore had no occasion to express any opinion regarding its correctness or incorrectness.

Lastly, in 67 *P. R.* 1914 (Rattigan and Beadon, JJ.) (4) the Full Bench case was again distinguished. It was pointed out that it applied only to cases of breach of promise to pay consideration in the future and not to misstatements in deeds that consideration, which had not really passed, had been paid. A similar distinction, it may be noted, had been in 31 *P. R.* 1911 (5). Mr. Sewa Ram Singh argues that the distinction is fallacious, but we are not called upon to decide the point.

The above, then, is my answer to the reference.

CHEVIS, J.—I concur and have nothing to add.

4th March 1916.

SCOTT-SMITH, J.—I concur.

6th March 1916.

SHADI LAL, J.—I concur generally in the answer given by the learned Chief Judge to the question referred to the Full Bench.

LEROSSIGNOL, J.—I concur generally.

11th March 1916.

No. 54.

Before Hon. Mr. Justice Rattigan.

SOHAN LAL AND OTHERS—(PLAINTIFFS)—
PETITIONERS,

Versus

PURAN SINGH—(DEFENDANT)—RESPONDENT.

Civil Revision No. 570 of 1915.

Indian Contract Act, IX of 1872, section 131—responsibility of surety where plaintiff withdrew his claim against the representatives of the deceased

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- (1) 26 *P. W. R.* 1908 (*Mangladha v. Lal Chand*).
 - (2) 59 *P. R.* 1907 (*F. B.*) (*Gokal Chand v. Rahman*).
 - (3) 66 *P. R.* 1912 (*Kiman v. Sultani Mal*).
 - (4) 67 *P. R.* 1911 (*Muni Lal v. Chatter Singh*).
 - (5) 31 *P. R.* 1911 (*Karm Chand v. Mussammatt Basant Kaur*).

principal who according to the pleas of defendants (including the surety) was a minor at time of contract.

Plaintiffs sued for recovery of a sum of money on the allegations that N. was indebted to him to that extent on a *bahi* account, that N. had died and that defendants 1—6 were his legal representatives and that P. S. defendant No. 7 had stood surety for the due payment of the money. The defendants pleaded *inter alia* that N. at the time of the contract was a minor and plaintiff subsequently withdrew his claim against N's legal representatives and elected to proceed only against P. S. the surety. The lower Courts dismissed the claim against him on the ground that as plaintiff had by his conduct discharged the legal representatives of the principal debtor from liability the surety was equally discharged under section 134 of the Contract Act.

Held that these grounds were untenable for two reasons—

(1) as P. S. having himself subscribed to the written statement filed by N's legal representatives must himself be taken to have urged the non-liability of the latter and that it was therefore with his implied assent that they were discharged from liability, and

(2) where the original agreement is void as in the case of a minor's contract in India, the surety is liable as a principal debtor.

Pollock and Mulla's Indian Contract Act, page 378, referred to.

Revision from the order of E. T. Bhan, Esquire, Senior Subordinate Judge, Gurdaspur, dated the 25th day of March 1915.

Nanak Chand, for Petitioners.

Daulat Ram, for Respondent.

The Judgment of the learned Judge was as follows :—

17th Dec 1915.

RATTIGAN, J.—Plaintiffs sued for recovery of a specified sum of money on the allegations that one Nathu was indebted to him to that extent on the basis of a *bahi* account; that Nathu had died; that defendants 1—6 were his legal representatives and that defendant No. 7, Puran Singh had stood surety for the due payment of the money. The seven defendants filed a joint written statement to the effect that Nathu at the time of the contract was a minor; that his contract was void; that his legal representatives were not bound by his contract; that repayments had been made to plaintiff; and that Puran Singh had not stood surety for the payment of the money. During the pendency of the case, the plaintiff withdrew his claim against the legal representatives of the deceased debtor and elected to proceed only against Puran Singh as surety. The Courts below have concurred in finding that Nathu was a minor at the time of the contract and in holding that as the plaintiff had by his conduct discharged the legal representatives of the principal debtor from liability, the surety was equally discharged under section 134 of the Indian Contract Act. The Munsif

further held that inasmuch as the contract made by Nathu was void, he being a minor, the contract of the surety was equally void. Neither Court has given any definite finding as to whether Puran Singh did in fact undertake to stand surety, or as to the amount actually due to plaintiff. Plaintiff's suit having been dismissed, an application for revision has been filed on his behalf and I have heard counsel on both sides.

Mr. Daulat Ram for Puran Singh did not contend before me that his client had not agreed to stand surety for the minor's due performance of his contract; on the contrary he argued on the assumption, that he had agreed to stand as such, but that he was released from liability on the grounds given in the judgments of the lower Courts.

In my opinion those grounds are untenable. In the first place Puran Singh who subscribed to the written statement filed by Nathu's legal representatives, must himself be taken to have urged the non-liability of the latter, and it was therefore with his implied assent that they were discharged from liability: And in the second place, to quote from Pollock and Mulla's Indian Contract Act (page 378): "where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor, for in such a case the contract of the so-called surety is not a collateral, but a principal contract." Puran Singh, then, in the present circumstances must be regarded as the principal debtor, and the fact that the plaintiff withdrew his claims against Nathu's legal representatives (a claim which had no foundation in law as being based on a void contract) cannot affect Puran Singh's liability to pay whatever amount is found due to plaintiff on the basis of the contract.

I hold, therefore, that Puran Singh if he really stood surety for Nathu would be liable to pay plaintiff whatever was legally due to the latter on the contract. But the questions whether Puran Singh did consent to act as surety, and if so, what amount is due to plaintiff on the contract, have not been tried and determined by the Courts below and the case must accordingly be remanded for decision on the merits. (Order 41 rule 23, Civil Procedure Code).

I remand it accordingly. Costs will abide the event.

Revision accepted.

No. 55.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge and
Hon. Mr. Justice Rattigan.

MUSSAMMAT BAKHTAWARI—(DEFENDANT)—
APPELLANT,

Versus

SHIBBAN LAL AND OTHERS—(PLAINTIFFS).
RESPONDENTS.

Civil Appeal No. 786 of 1910.

Punjab Alienation of Land Act, XIII of 1900, section 9 (3)—mortgage—conditional sale—reference by Civil Court to Deputy Commissioner—jurisdiction of Civil Court after such reference.

Held, that after a Civil Court has made a reference in regard to a mortgage by conditional sale under section 9 (3) of the Punjab Land Alienation Act and the Deputy Commissioner has made an offer to the mortgagees which they rejected, the Civil Court is *functus officio*.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 9th April 1910.

Moti Sagar, for Appellant.

Sundar Das, for Respondents.

The Judgment of the Court was delivered by :—

17th Dec. 1915.

RATTIGAN, J.—By our order dated 3rd February 1912, we held that the mortgage in favour of plaintiffs still subsisted and was not open to objection on the ground of failure of consideration or absence of necessity, and we referred the case to the Deputy Commissioner under section 9 (3) of the Punjab Land Alienation Act, 1900, for such action as he might think fit to take. We further added that in the event of the Deputy Commissioner deciding to take no action under section 9 of the Act, the record should be returned to this Court for further orders.

It appears that the Deputy Commissioner did take action under section 9 of the Act and offered the mortgagees a lease of half the land mortgaged for a period of six years but that the mortgagees were not willing to accept the terms offered to them. Mr. Sundar Das states that the mortgagees did not understand their position or the Deputy Commissioner's proposal, but be that as it may, we are, as matters stand, *functi officio* and have no further jurisdiction in the case. The mortgagees may have a right of appeal under section 19 of the Act from the order of the Deputy Commissioner to the proper Revenue authority, but that again is a matter upon which we can give no opinion. The record has been returned to us under

a mistake and we accordingly direct that it be sent back to the Deputy Commissioner with a copy of our present order.

As neither party appears to be responsible for this further reference to this Court, we leave them to bear their own costs of the present hearing.

No. 56.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr.

Justice Leslie Jones.

DEVI DITTA AND OTHERS—(DEFENDANTS)—
APPELLANTS,

versus

MUSSAMMAT INDAR DEVI AND OTHERS—(PLAINTIFFS),
MUSSAMMAT NARAIN—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 1036 of 1913.

Custom—succession—non-ancestral land—daughters or collaterals—Jats of the Kharar Tahsil, Ambala District—onus probandi as to property being ancestral—res judicata.

The plaintiffs, as daughters of one H., a Jat of Mauza Rurki in the Kharar Tahsil of the Ambala District, claimed to succeed to their father's property. The defendants, collaterals in the 5th or 7th degree, alleged that the property was ancestral and that they were preferential heirs.

Held, that the *onus probandi* that the land was ancestral was on the defendants and that they had failed to discharge the *onus*.

Held also, that this question was not *res judicata* by reason of a previous suit brought by the collaterals to contest an alienation of the property made by H's widow for two reasons, *viz.* :—

(a) because the matter was not put in issue and decided and a chance remark in the judgment could not be taken to be a decision, and

(b) because it was unnecessary to decide in an action contesting a widow's alienation whether the property was ancestral or not.

Held further, that the collaterals had failed to prove a special custom whereby daughters are excluded by collaterals in the matter of succession to non-ancestral property.

*Second appeal from the decree of M. L. Waring, Esquire,
Divisional Judge, Ambala, dated the 7th March 1913.*

Devraj Sawhny, Dhanpat Rai and Durga Das, for Appellants.

Broadway and Sewaram Singh, for Respondents.

The order of the Court was delivered by—

SHADI LAL J.,—In this case, the dispute is between the daughters and the collaterals with respect to succession to the 20th Dec. 1915.

estate of one Hamela, a Jat of Mauza Rurki in the Kharar Tahsil of the Ambala District. The learned Divisional Judge, who has decreed the suit of the daughters, has found that the collaterals have failed to establish their allegation as to the ancestral character of the land, and it is clear that on the record there is no evidence to prove that the land was owned by the common ancestor. It is manifest that the *onus* is on the persons who allege the property to be ancestral and the circumstance, that they happen to be defendants in this case, does not shift the *onus* on to the plaintiffs.

It is, however, contended that in a previous suit the Courts held that the land was ancestral and that the decision arrived at in that case operates as *res judicata*. Now we find that the suit alluded to above was brought by the collaterals for a declaration in respect of an alienation made by Hamela's widow, that there was no issue raising the question whether the property was or was not ancestral, and that the Courts did not record a finding thereon. A chance remark made in the judgment cannot be taken as a decision, such as would be binding in a subsequent suit. Further, we consider that in an action brought to contest an alienation by a widow it was unnecessary to decide whether the property had descended from a common ancestor.

We must, therefore, take it that the land in suit has not been proved to be ancestral, and it is undeniable that in succession to non-ancestral property the daughters exclude the collaterals, who in this case appear to be related in the seventh degree, and, according to their own admission, in the fifth degree. There is not a scintilla of evidence to establish a special custom whereby daughters are excluded by collaterals in the matter of succession to non-ancestral property. The Court of first instance framed an issue on this point and the defendants, on whom the *onus* rested, have failed to adduce any evidence to discharge it.

For the foregoing reasons the judgment of the learned Divisional Judge must be upheld. The appeal therefore fails and is hereby dismissed with costs.

Appeal dismissed.

No. 57.

*Before Hon. Mr. Justice Shadi Lal and Hon. Mr.
Justice Leslie Jones.*

GANGA SINGH AND MUSSAMMAT HARDEVI—

(DEFENDANTS)—APPELLANTS,

Versus

MUSSAMMAT BEGAM AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 658 of 1912.

Apostacy—conversion of a member of a joint Hindu family to Muhammadanism—effect of—limitation for suit by convert for his share in the co-parcenary property on separation—Indian Limitation Act, IX of 1908, articles 142 and 127.

One Ganda Mal, a Khatri, had 3 sons, G. M. who died in 1888, B. D. who died in 1893 and K. C. who died in 1909. G. M. had 2 sons R. R. and M. R., the former died sonless and the latter, the present plaintiff, became a Muhammadan. K. C. left 2 daughters, Mussammats H. D. and G. D., the former of whom is now represented by her son G. S.; B. D. died sonless. When K. C. died he had in his possession a considerable property, a small part of which was ancestral having been held either by Ganda Mal or some more remote ancestor, the remaining property was acquired after Ganda Mal's death. When K. C. died the whole of his property was taken by Mussammat G. D. and G. S. against whom in 1911 the plaintiff brought the present suit for possession of the whole property by survivorship as a member of a joint Hindu family still existing at time of K. C.'s death. Plaintiff became a Muhammadan 10 or 11 years before suit, i.e., in the lifetime of K. C.

Held, that the effect of plaintiff's conversion to Muhammadanism was *ipso facto* to separate him from the co-parcenary.

I. L. R. 25 All. 546 (573) (1), referred to.

Held also, that as plaintiff by reason of his conversion to Islam was not a member of the joint Hindu family at the time when the suit was instituted it was for him to prove that the separation of the family had taken place not more than 12 years before suit.

I. L. R. 18 All. 90 (2), referred to.

Held further, that plaintiff had failed to prove that he remained a member of the joint Hindu family as late as within 12 years of institution of suit and that consequently a suit by him for a share of co-parcenary property on separation was barred by time—article 142 of the Limitation Act.

Held consequently, that all the plaintiff could claim was his share in the ancestral property.

(1) (1903) *I. L. R. 25 All. 546 (573)* (*Gobind Krishna Narain v. Abdul Qayyum*).

(2) (1895) *I. L. R. 18 All. 90* (*Ram Ghulam Singh v. Ram Behari Singh*).

First appeal from the decree of Izzat Nishan Nawab Malik Khuda Bakhsh, District Judge, Gujrat, dated the 9th March 1912.

Govind Das, for Appellants.

Badr-ud-Din, for Respondents.

The Judgment of the Court was delivered by—

23rd Dec. 1915.

LESLIE JONES, J.—Owing no doubt in some degree to the plaintiff's own uncertainty as to his position in this case, the judgment of the District Judge betrays considerable confusion ; and we think that the best plan in dealing with this appeal is to treat the case as presented to us in this Court.

Ganda Mal, a Khatri, had three sons, Ghasita Mal, who died in 1888, Bhagwan Das, who died in 1893, and Kahn Chand, who died in 1909. Ghasita Mal again had two sons, one of whom, Ralla Ram, died sonless in 1908 ; his second son, Mela Ram, the present plaintiff, is a convert to Islam. Kahn Chand left two daughters, Mussammat Har Devi and Mussammat Gur Devi the former of whom is now represented by her son Ganga Singh. Bhagwan Das died sonless.

When Kahn Chand died he had in his possession a considerable property. A small part of this property is admittedly ancestral having been held either by Ganda Mal or by some more remote ancestor ; the remaining property, moveable and immoveable was acquired after Ganda Mal's death. When Kahn Chand died the whole of this property was taken by Mussammat Gur Devi and Ganga Singh against whom Mela Ram (now called Din Muhammad) instituted the present suit in 1911 for possession of the whole. He has obtained a decree for half of the immoveable property, and the defendants have now appealed to this Court

The only ground on which the plaintiff could claim to take the whole property is by survivorship as a member of a joint Hindu family still existing at the time of the death of Kahn Chand, and it would seem that this was his original intention, for although in the plaint he spoke of himself as Kahn Chand's heir, he afterwards stated more explicitly that the family was joint until the time of Kahn Chand's death and produced evidence to that effect. At a later stage, however, he admitted through his counsel that Kahn Chand's daughters were entitled to keep half of the property, and on this admission the District Judge, though finding that the family was joint till Kahn Chand's death, gave the plaintiff a decree for half of his claim.

It is sufficiently obvious that if the family continued joint the plaintiff was entitled to take the whole property by

survivorship, but there is an excellent reason why any claim on the part of the plaintiff to take by survivorship must fail.

On his own showing the plaintiff embraced Islam ten or eleven years before the institution of this suit. (The date of his conversion has been disputed by counsel for the appellants but we see no reason to doubt that he gave it correctly. Two of his witnesses have given evidence to the same effect and there is no rebuttal on behalf of the defence). The effect of the plaintiffs' conversion to Muhammadanism was *ipso facto* to separate him from the co-parcenary, *vide* 25 All. 516 at page 573 (1).

Counsel for the respondent has endeavoured to show that the plaintiff continued to be accepted by the family as one of its joint members and went on to argue, as we understand him, that if that was so it must be taken that Kahn Chand accepted the proposition that conversion to Islam does not operate to break out the co-parcenary. We are unable, however, to find any substantial evidence that Kahn Chand regarded the matter in this light or even that the plaintiff, after his conversion, continued to be treated as a member of a joint Hindu family and accordingly we do not propose to discuss this argument further.

Although counsel for the respondent has continued to insist on the jointness of the family up till the time of Kahn Chand's death, we have, nevertheless, considered whether it ought not to be held that the plaintiff was entitled to claim one-fourth of the property on the ground that that was his share at the time when he was converted to Islam. (He could not possibly claim one-half because having ceased to be a member of the joint Hindu family the share of Ralla Ram his brother would go by survivorship to Kahn Chand). There is here, however, another and an insuperable difficulty in the plaintiff's way. As by reason of his conversion to Islam he was not a member of the joint Hindu family at the time when the suit was instituted, it was for him to prove (*vide* amongst other rulings 18 All. 90 (2)) that the separation of the family had not taken place more than 12 years before the suit was instituted. It is true that his conversion to Islam was within that period, but that fact does not settle the matter. He is still faced with article 142 of the Limitation Act. There is of course the oral evidence to that effect, but we are unable to regard it as at all trustworthy, and

(1) (1903) I. L. R. 25 All. 516 (573) (*Gobind Krishna Narain v. Abdul Qayyum*).

(2) (1895) I. L. R. 18 All. 90 (*Ram Ghulam Singh v. Ram Behari, Singh*).

the only other point upon which the counsel for respondent is able to rely is the fact that some of the landed property acquired after the death of Ganda Mal was standing in the names of Kahn Chand and Ralla Ram as co-sharers in 1907. No copy, however, of the mutation order by which these entries were effected has been produced and the probability is that when Bhagwan Das, who had acquired property in his own name, died, the Revenue officer treated the question of succession as if it were one falling under customary law, and that when on enquiry as to the heirs of Bhagwan Das he discovered that Bhagwan Das had left a brother and a brother's son, he ordered mutation accordingly.

On the other hand we know that when Bhagwan Das died Kahn Chand took out a succession certificate and in a will of 1894 expressly disclaimed jointness with Ralla Ram. None of the property acquired since the death of Ganda Mal was acquired in the name of Ghasita Mal or either of his sons, and there is no likelihood that the acquisitions were in any way due to a nucleus of ancestral property which consisted only of a small share in a residential house and a shop of trifling value. We know, moreover, that the plaintiff had left his home for a number of years before his conversion to Islam and this is an additional reason which makes it very unlikely that he should have remained a member of a joint Hindu family as late as within 12 years of the date of the institution of the suit. We must hold therefore that he has been unable to show that a suit by him for a share of co-parcenary property on separation is within time.

The case as regards ancestral property stands on a different footing. As regards such property the plaintiff was a co-sharer and the presumption is that his title continued "until it was extinguished by some overt act of adverse possession." Consequently counsel for the appellants was obliged to concede that in that property the plaintiff is entitled to the share which was his at the time of his conversion. There has been a dispute as to how much of the property is ancestral in character, but counsel for the appellants has been successful in showing that only a part of one house and a part of one shop can be so described. The plaintiff was entitled to one-sixteenth of the house in plan No. 1 and one-eighth of the shop in plan No. 2. We must accordingly accept the appeal and modify the decree of the first Court so as to give the plaintiff a decree only for one-sixteenth of the said house and one-eighth of the said shop.

As the defendants-appellants originally elected to deny that the plaintiff was the son of Ghasita Mal, a plea which they

totally failed to substantiate and have since abandoned, and also contested the plaintiffs' claim even to a share in the ancestral property we direct the parties to bear their own costs throughout.

The plaintiff respondent has died during the pendency of the appeal leaving a penniless widow and a child. We cannot but express the hope that the appellants will make some suitable provision for the unfortunate widow.

Appeal accepted.

No. 58.

*Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
Le Rossignol.*

INDAR NARAIN AND OTHERS—(DEFENDANTS)—
APPELLANTS,

versus

NANAK CHAND AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 872 of 1911.

Hindu law—Joint family—liability of sons for debts incurred by their father, a business man with debts who spent money extravagantly for immoral purposes and drink—inference of immorality.

This was a suit by the mortgagees for recovery of principal and interest due on 8 mortgage deeds charging the same properties in each deed and made by one J. N., since deceased, whose 2 sons and a grandson were sued as surviving members of the Joint Hindu family represented by J. N. It was pleaded by defendants that the late J. N. was a drunkard and addicted to debauchery, &c. It was found as a fact by the Chief Court that the mortgaged property was under the circumstances of the case ancestral property and further that J. N. did lead an irregular life and spent extravagantly on wine and women, that on the other hand he expended large sums in litigation and encountered heavy losses in business, that his debts, immoral and moral, were inextricably entangled and that it was impossible to determine how much was moral and how much immoral, that though the plaintiffs were aware of J. N.'s weakness there was no sound basis for holding that they could distinguish between his proper and his improper necessities.

Held, that the inference of immorality spoken of in 50 P. R. 1913 (1) to be drawn in cases in which as a fact all proper debts had been defrayed from other monies than those in respect of which the suit is brought, is applicable only where the debtor had no debts or business on which the loans might have been expended with propriety.

Held, also, that the general rule no doubt is that some clear connection between the debt and the immorality must be established, but that it does not follow that every debt of an immoral individual is an immoral debt.

Held consequently, on the facts found (vide supra) that the defendants were liable for the amount of mortgage money actually proved to have passed together with interest thereon.

First appeal from the decree of J. Addison, Esquire, Additional District Judge at Delhi, dated the 19th April 1911.

Muhammad Shafi, Rup Narain and Ram Kishore, for Appellants.

Kirkpatrick, Dalip Singh, Wazir Singh and Moti Sagar, for Respondents.

The judgment of the Court was delivered by—

3rd Jan, 1916

LEROSSIGNOL, J. * * * * *
* * * * * On the question of consideration we have heard very long arguments and have been led through a maze of accounts. Although the mortgages are registered documents it must be remembered that the defendants are not the original debtors but are setting up their title as against that of the original debtor, consequently on plaintiffs lies the *onus* of establishing that consideration passed. The first mortgage is dated 17th February 1903 and is for Rs. 32,000; of this Rs. 28,000 are admitted whilst the remaining Rs. 4,000 are proved by detailed entries in the plaintiffs' cash book.

We hold that full consideration passed, that Jai Narain was indebted to the Alliance Bank and other persons in heavy sums, and was also suffering serious losses in business. It is noteworthy that Rup Narain his brother against whose character there is no suggestion of any kind, was also heavily indebted at the time, that he too had dealings with the plaintiffs, that he too executed a mortgage to plaintiffs for Rs. 28,000 on the same date and that he attested as a witness all the mortgages in suit except two which were executed during his absence from Delhi.

This last circumstance does not bind the defendants, but it is not without significance, for Rup Narain is the real defendant in this case acting on behalf of his minor nephews.

It is quite possible, even probable, that some portion of this loan was spent on Mussammat Chavanni and on drink, but it is quite impossible for us to say what portion that was, while so far as plaintiffs knew, the whole may have been required to liquidate legitimate debts. The whole of this mortgage must stand.

The second mortgage for Rs. 11,000 is dated 3rd August 1904. It refers to pending litigation. Of this Rs. 8,000 was for the payment of *hundis* previously cashed by the debtor. Those cash payments have been traced by us in the plaintiffs'

cash book (pages 255—259 of paper book) ; the balance paid in cash and by deduction of interest on the previous mortgage is attested also by the cash book entries and by the certificate of the Sub-Registrar. Though we have found that the Sub-Registrar's certificate in most of these mortgages differs in details from the cash book entries, we do not doubt that both tally, in reality consideration for this mortgage is proved.

The third mortgage, dated 2nd May 1905, is for Rs. 21,000 of which Rs. 10,200 were due on *hundis*. The cash payments of the amounts due on the *hundis* have been proved from the plaintiffs' cash book (pages 270—272 of paper book).

The cheques handed over to Jai Narain were cheques drawn by Rup Narain in favour of plaintiffs and as Rup Narain attested the deed and did not prove by positive evidence that he had never issued such cheques, we see no reason for disbelieving plaintiffs' books. The details of cash and currency notes are discrepant, but on page 282 the numbers of the notes are given and we hold that consideration passed in full.

The fourth mortgage, dated 16th September 1905, is for Rs. 18,000 made up as follows : —

			Rs
6 <i>Hundis</i> paid off	13,500
Cash before Registrar	4,500

Counsel for plaintiffs admits that he cannot point to any entries in his clients accounts which shew cash payments against the *hundis* cited in the mortgage-deed. He suggests that the dates given in the deed are incorrect ; the case however is of such a type that we must insist on reasonable proof of consideration for each *hundi* and that proof is here lacking, for plaintiffs do not produce even the cancelled *hundis*.

The fifth mortgage, dated 6th March 1906, is for Rs. 25,000. Rs. 500 were on account of *hundis* on plaintiffs, cash payments shewn on page 277 although the dates do not tally. The receipts for Rs. 4,500 are entered on page 278 ; the *hundis* on third persons on page 48 and one *rugqa* for Rs. 2,500 is accounted for at the bottom of page 278, but the *rugqa* for Rs. 1,100 cannot be traced.

The sixth mortgage, dated 22nd October 1906, is for Rs. 9,500.

Hundis for Rs. 6,000 are shown on page 279. The receipt for Rs. 1,300 is accounted for on page 280.

The cash paid before the Registrar is shown as item 31 on page 283.

The cash items in the seventh and eighth mortgages also are established ; the other items of importance are! for interest due on the earlier mortgages. These seventh and eighth mortgages are dated respectively 9th September 1907 and 1st June 1909.

On the question of necessity we have been addressed at very great length by both counsels ; the line taken by appellants was an attempt to shew that the costs of litigation and business losses had been defrayed from other sources than plaintiffs' loans.

Even had appellant been wholly successful in his attempt, that would not justify a finding in his favour, for if the debts existed, the plaintiffs were not bound to see to the application of the money.

The plaintiffs' books show their claim is made up of the following items :—

Rs.

1,21,436 Cash actually advanced.

7,027 Discount.

32,666 Interest on *hundis* after due date and on mortgages.

481 Rent.

Total 1,61,660

Less 17,600 repaid.

Balance in suit Rs. 1,44,000 *plus* interest.

As noted above the cash payments have been traced with the exception of Rs. 14,600.

Out of the first loan Rs. 28,000 appear to have been deposited in the Delhi and London Bank, some Rs. 13,000 were paid off to the Alliance Bank on account of their mortgage and large sums were paid to counsel and others for litigation in the Chief Court. With respect to the other mortgages, the District Judge has shewn that substantial sums were paid out of the consideration into the Delhi Bank and that large cheques on that Bank were issued by Jai Narain to pay counsel and also to liquidate the losses on his unfortunate venture into business.

It must be remembered that from 1897 until almost the date of his death Jai Narian was involved in very expensive litigation. Mussammat Sarsuti's case dragged on from 1897 to 1909. The probate of Izzat Narain's will was in dispute from November 1900 to December 1901.

Another suit against Izzat Narain's son, Ram Kishen, lasted from April 1901 to June 1901.

The business was one in piece-goods and iron and resulted in dismal failure. What the precise figure of the losses was, is not established but it was something considerable; Mr. Roberts page 457 states that he closed some of the accounts and Jai Narain paid the losses, but he did not see any accounts and did not wind up the whole business and over Rs. 7,000 are said to be still due.

The business was carried on on an extensive scale, but no books are said to have been kept. This we find hard to believe, more especially as Ram Kanwar refers to a big book kept by Jai Narain which has not been produced. It is quite impossible for us to say what the business losses were.

Jagat Narain's wedding is said to have been one of the causes of Jai Narain's indebtedness; defendants point out that the wedding took place before the date of the first mortgage, but this is no conclusive argument, for at the date of the first mortgage Jai Narain was already deeply involved.

[The remainder of the judgment is not required for the purposes of this report—ED.]

Appeal accepted.

No. 59.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice Leslie Jones.

JHANDA AND OTHERS—(DEFENDANTS)—APPELLANTS,

versus

DATA RAM—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 553 of 1912.

Punjab Tenancy Act, XVI of 1887, section 77 (3)—suit by mortgagor for redemption—Claim by defendant that he is an occupancy tenant—whether Civil Court can take cognisance of such a claim.

Plaintiff mortgaged the land in suit with possession to defendants who were then recorded as tenants at will. Plaintiff now sued for redemption. Defendants pleaded that their real position was that of occupancy tenants and that consequently plaintiff was not entitled to a decree for physical possession of the property.

Held, that the defendants' plea could not be taken cognisance of by a Civil Court, *vide* section 77 (3) of the Punjab Tenancy Act.

76 P. R. 1909 (F. B.), referred to.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi, dated the 7th October 1911.

Pir Taj-ud-Din, for Appellants,

Nand Lal, for Respondent.

The Judgment of the Court was delivered by :—

14th Jan. 1916.

LESLIE JONES, J.—The plaintiff mortgaged the land in suit, with possession, to the defendants, who were then recorded as tenants-at-will of the said land. The plaintiff has now sued for redemption. His right to redeem has not been contested, but the defendants set up a plea that their real position was that of occupancy tenants and that consequently the plaintiff was not entitled to a decree for physical possession of the property.

The Additional Divisional Judge in a judgment dated 7th October 1911, *i.e.*, on a date before Punjab Act III of 1912 was passed, held on the authority of 76 P. R. 1909, *F. B.* (1) that this plea could not be entertained, and concurring in the finding of the Additional District Judge, who had come to the same conclusion, and had granted the plaintiff a decree for the relief claimed, dismissed the defendants' appeal.

The defendants have now preferred a further appeal to this Court.

The arguments of counsel for the defendant-appellants have not been very clear but, having regard to the date of the decision of the appeal, 76 P. R. 1909 is of full application, and the only question is whether the plea of the defendants relates to a matter in respect of which they would have been entitled to bring a suit in a Revenue Court (*vide* section 77 (3) of the Punjab Tenancy Act). If it does, then the Courts below were, under the authority cited, right in ignoring it.

Counsel for the appellants does not admit that the defendants have lost their status as tenants, but the contention is, that as the proprietor had mortgaged his rights, the persons in possession, *i. e.*, the defendants themselves and not the proprietor, are the landlords, and that consequently a suit to establish occupancy rights would not have been cognizable by a Revenue Court, because the status of landlord and tenant did not exist between the parties.

There is, of course, no doubt that a mortgagee is a landlord for certain purposes, but we do not think that where the question is one of establishing occupancy rights the proprietor can be excluded from the category of landlord merely because he has mortgaged his rights. Supposing for instance the proprietor

(1) 76 P. R. 1909 (*F. B.*) (*Haji Muhammad Bakhsh v. Bhagwan Das*).

has mortgaged his rights to a third party, it would not be open to the tenant to bring a suit to establish such rights against the mortgagee only, without impleading the proprietor as landlord.

The position which a mortgagee holds as such is of a temporary character, and where rights of a permanent character such as occupancy rights are in question, the person principally concerned is the proprietor in his capacity as landlord. As mortgagees the defendants could not have sued to establish such a right, and if, as is contended on their behalf, they are tenants at all they would be compelled for the purpose of such a suit as is under consideration to recognise the proprietor as landlord.

We think, therefore, that the Courts below were right in declining to entertain this plea. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 60.

Before Hon. Mr. Justice Shah Din.

**KANSHI RAM AND OTHERS—(DEFENDANTS)—
APPELLANTS,**

Versus

**SARDA NAND AND NARAIN DAS—(PLAINTIFFS)—
MUSSAMMAT BISHAN DEVI AND OTHERS—
(DEFENDANTS)—RESPONDENTS.**

Civil Appeal No. 2727 of 1914.

Suit for declaration—by reversioners to contest alienation by a widow in presence of a nearer heir—status of plaintiffs to sue—contents of plaint—Sareen Khattris of Lahore—Hindu Law.

One C. R. a Sareen Khattri of Lahore, died leaving a widow, a daughter and a son of the daughter who was a minor. These three together sold a house which formed part of C. R.'s estate; and the plaintiffs as reversionary heirs of C. R. sued for a declaration that the sale was invalid. It was found that the parties were governed by Hindu Law by which the daughter's son was the nearest heir after his mother's death. The question for decision was whether the plaintiffs had any *locus standi* to bring this suit.

Held, that the principles applicable to the case were those laid down by their Lordships of the Privy Council in *I. L. R. 6 Cal 764* (at pages 772 and 773) (1), and the decision turned upon whether the daughter's son in the present case had precluded himself by his *own act or conduct* from suing or had *colluded with the widow* or *occurred* in the

(1) (1880) *I. L. R. 6 Cal. 764* (772-773) (P. C.) (*Rani Anand Kunwar v. Court of Wards.*)

act alleged to be wrongful. As the daughter's son was a minor at the date of the alienation and was still a minor at the date of suit the answer to the question must be in the negative, and the plaintiffs were consequently not entitled to the declaration prayed for.

Held also, that according to the principles laid down by their Lordships in the case aforesaid the plaintiffs as the more distant reversionary heirs of C. R. should have stated in their plaint the circumstances under which they claimed to sue in the presence of the nearest reversionary heir, and upon a plaint so framed the Court should have exercised its judicial discretion in determining whether the more remote reversioners were entitled to sue or not after considering *inter alia*, on the one hand, whether plaintiffs' chances of succession were so remote that no declaration should be granted to them and on the other hand, whether the declaration if made would serve the purpose of perpetuating testimony for whomsoever might happen to be the next reversioner on the death of the widow.

119 P. R. 1901 (pages 412 and 413) (1), 149 P. R. 1908 (2), I. L. R. 34 All. 207 (3); 18 Indian Cases 212 (4), I. L. R. 32 Cal. 62 (5), and I. L. R. 28 Mad. 57 (6), referred to.

Second appeal from the decree of Major A. A. Irvine, District Judge, Lahore, dated the 2nd October 1914.

Gobind Das, for Appellants.

Parduman Das, for Respondents.

The Judgment of the learned Judge was as follows :—

17th Jan. 1916.

SHAH DIN, J.—This is an appeal from an order of remand made by the District Judge, Lahore, under order 41, rule 23, Civil Procedure Code. The plaintiffs-respondents who are the reversionary heirs of one Chhajju Ram, deceased, a Sareen Khatri of Lahore, brought a suit against his widow, Mussammat Bishan Devi, his daughter Mussammat Ram Rakhi and his daughter's son Jalandhri Mal, a minor, and also against the present defendants-appellants for a declaration that a registered sale-deed, dated the 20th October 1911, executed by Mussammat Bishan Devi, Mussammat Ram Rakhi and Jalandhri Mal in favour of the defendants-appellants in respect of a house situate in Lahore shall not affect the reversionary rights of the plaintiffs. The plaintiffs alleged that the parties were governed, not by their personal law, but by a special custom under which the alienation in question was invalid. On the other hand, the defendants' vendors pleaded that Hindu law applied to the parties and not custom, and that the plaintiffs as collateral heirs of Chhajju Ram were not entitled to sue to have the sale of the 20th October 1911 declared invalid in the presence of the

(1) 119 P. R. 1901 (pages 412-413) (*Wishan Das v. Thakar Das*).

(2) 149 P. R. 1908 (*Kapurja v. Mangal*).

(3) (1912) I. L. R. 34 All. 207 (*Raja Dei v. Umed Singh*).

(4) (1911) 18 Indian Cases 212 (*Ayula Guruvayya v. Ayula Venkanna*).

(5) (1904) I. L. R. 32 Cal. 62 (*Abinash Chandra v. Hari Nath Shaha*).

(6) (1904) I. L. R. 28 Mad. 57 (*Sorinda Pillai v. Thayammal*).

daughter and the daughter's son of the deceased. It has been found by the Courts below that the parties are governed by Hindu law, and this finding is not now disputed before me. As regards the *locus stendi* of the plaintiffs to contest the sale in dispute, the Subordinate Judge held, on the authority of 149 *P. R.* 1908 (1), that in the presence of Jalandhri Mal, daughter's son of Chhajju Ram, who was the nearest reversionary heir, with full proprietary rights, to his maternal grand-father after his mother Mussammatt Ram Rakhi's death, the plaintiffs' chances of succession were so remote that no declaration should be granted in their favour. He accordingly dismissed the suit.

On appeal the learned District Judge was of opinion that the decision in 149 *P. R.* 1908 (1) was not applicable to the facts of the present case, inasmuch as there the alienation, which was contested by the male collaterals of the deceased proprietor, had been made by the widow alone, whereas in this case the alienation had been made by the widow and the daughter and the daughter's son of the last male proprietor jointly.

Following the principle laid down by their Lordships of the Privy Council in *I. L. R.* 6 *Cal.* 764 (2) and the cases reported in *I. L. R.* 34 *All.* 207 (3), 18 *Indian Cases* 212 (4), and *I. L. R.* 32 *Cal.* 62 (5), the District Judge held that the daughter and the daughter's son of Chhajju Ram, who had joined the widow in the alienation in dispute, had precluded themselves from contesting it, and that therefore the plaintiffs, though more remote reversioners of Chhajju Ram, were entitled to maintain the suit for a declaration as to the invalidity of the said alienation. He accordingly set aside the decree of the Subordinate Judge dismissing the suit, and remanded the suit for decision on the merits.

The sole question discussed before me in appeal is as to whether the District Judge was right in setting aside the decree of the Subordinate Judge on the ground that, in the circumstances of the case, the plaintiffs were entitled to the declaration claimed by them. The learned pleader for the appellants has relied on 119 *P. R.* 1901 (pages 412 and 413) (6) and 149 *P. R.* of 1908 (1), while the pleader for the respondents

(1) 149 *P. R.* 1908 (*Kapuria v. Mangal*).

(2) (1880) *I. L. R.* 6 *Cal.* 764 (*P. C.*) (*Rani Anand Kunwar v. Court of Wards*).

(3) (1912) *I. L. R.* 34 *All.* 207 (*Raja Dei v. Umed Singh*).

(4) (1911) 18 *Indian Cases* 212 (*Ayula Guruwaya v. Ayula Venkanna*).

(5) (1904) *I. L. R.* 32 *Cal.* 62 (*Abinash Chandra v. Harinath Shaha*).

(6) 119 *P. R.* 1901 (pages 412, 413) (*Vishan Das v. Thakar Das*).

has cited *I. L. R. 34 All. 207* (1), 18 *Indian Cases* 212 (2), *I. L. R. 32 Cal. 62* (3) and *I. L. R. 28 Mad. 57* (4).

With reference to the decision of this Court in 149 *P. R. 1908* (5), the appellants' pleader argued that even assuming that the respondents' suit for a declaration was maintainable in the presence of Jalandbri Mal, daughter's son of Chhajju Ram, the plaintiffs' chances of succession were so remote that the Court would exercise a wise discretion in refusing to grant the declaration prayed for. The respondents' pleader, however, distinguished the case cited from the present case on the ground that whereas in 149 *P. R. 1908* (5) the daughter's son if any, had not joined in the alienation by the widow of the last male owner in the present case he has so joined along with his own mother, the daughter of Chhajju Ram; and that he has therefore concurred in the alienation and precluded himself from challenging its validity. In support of this part of his argument the respondents' pleader strongly relied upon *I. L. R. 34 All. 207* (at pages 209 and 210) (6). In the last mentioned case, it was urged, the daughter's son, who was the nearest reversionary heir presumptively entitled to the full ownership of the property, was the person in whose favour the alienation complained of had been made; while in the present case he joined in the widow's act of alienation through his mother who is his lawful guardian. The two cases stand, it was argued, on exactly the same footing, so far as the question under consideration is concerned, inasmuch as in both of them the daughter's son concurred in the alienation and thus precluded himself from suing to contest it.

In my opinion the principle applicable to the present case is that laid down by their Lordships of the Privy Council in the well-known case of *Rani Anand Kunwar v. The Court of Wards* (*I. L. R. 6 Cal. 764*) (7) and which has been expressly referred to and followed in most of the decisions cited before me on both sides. In the case cited their Lordships observe as follows at pages 772 and 773 of the report:—

“ Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, “ yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would

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- (1) 1912 *I. L. R. 34 All. 207* (*Raja Dei v. Umed Singh*).
 - (2) 1911 18 *Indian Cases* 212 (*Ayula Gururaya v. Ayula Venkanna*).
 - (3) 1904 *I. L. R. 32 Cal. 62* (*Abinash Chandra v. Harinath Shaha*).
 - (4) 1904 *I. L. R. 28 Mad. 57* (*Govinda Pillai v. Thayammal*).
 - (5) 149 *P. R. 1908* (*Kauria v. Mangal*).
 - (6) 1912 *I. L. R. 34 All. 207* (*Raja Dei v. Umed Singh*).
 - (7) 1880 *I. L. R. 6 Cal. 764* (772, 773) (*P. C.*) (*Rani Anand Kunwar v. Court of Wards*).

“succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji v. Jagan Nath Vitthal* (1) is correct. It cannot be the law that anyone who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordship’s opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue; see *Koer Gulab Singh v. Rao Kurun Singh* (2). In such a case upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit.”

The question for decision in this appeal is whether, with reference to the principle enunciated in the above paragraph by their Lordships of the Privy Council, it can be held that the daughter’s son in the present case has precluded himself *by his own act or conduct* from suing, or has *colluded with the widow* or *concurred* in the act alleged to be wrongful; for if he has done so then the suit of the plaintiffs, who are remote reversionary heirs of Chhajjn Ram, to contest the alienation in dispute is clearly maintainable. Now, the Courts below have not given due weight to the facts that Jalandhri Mal, the daughter’s son of Chhajju Ram, who is said to have joined the widow in the alienation in dispute, was a minor at the date of the alienation and is still a minor, and that the alienation complained of has been made in his name and on his behalf by his grandmother Mussammat Bishan Devi, widow of Chhajju Ram, and not by his own mother Mussammat Ram Rakhi. Can it be said in these circumstances that Jalandhri Mal has colluded with the widow Mussammat Bishan Devi or with his own mother Mussammat Ram Rakhi, or has concurred in the alienation or has precluded himself by his own act or conduct from suing to contest the alienation in question?

(1) (1873), 10 *Dom. H. C. R.* 351 (*Bhikaji Apaji v. Jagannath Vitthal*).

(2) 14 *Moo. I. A.* 176 (*Koer Gulab Singh v. Rao Kurun Singh*).

In my opinion the answer to this question must be in the negative, for beyond the fact that the name of Jalandhri Mal has been used in the sale-deed as a co-vendor with his mother and grandmother he is in no way concerned in the sale. As a minor, he was incompetent to enter into the contract of sale; and he was equally incapable, from a legal point of view of colluding with his mother or grandmother, or of concurring in their act of alienation; and it is obvious that since the date of sale he has not by his own act or conduct precluded himself from suing.

Next, according to the principle laid down by their Lordships in Rani Anand Kunwar's case, the plaintiffs as the more distant reversionary heirs of Chhajju Ram should have stated in their plaint the circumstances under which they claimed to sue in the presence of his nearest reversionary heir who was presumptively entitled to the full ownership of the property in dispute; and upon a plaint so framed the Court must exercise its judicial discretion in determining whether the remote reversioners are entitled to sue or not. It is clear that they are not entitled to the declaration asked for by them as a matter of right; on the one hand, the Court has to consider whether their chances of succession to the property in dispute are not so remote that no declaration should be granted to them, and on the other hand, it has to decide whether the declaration, if made, would serve the purpose of perpetuating testimony for whomsoever might happen to be the next reversioner on the death of the widow.

It is after fully weighing these considerations and the like that the Court should grant or refuse to grant the relief claimed by the more distant reversionary heir; and after taking these into account in the light of the principle laid down in Rani Anand Kunwar's case, my own view is that the District Judge was in error in holding that the plaintiffs in the present case were entitled to the declaration sought by them in respect of the invalidity of the alienation made by the widow and daughter of Chhajju Ram in favour of the appellants.

I accordingly accept this appeal, and setting aside the order of remand, restore the decree of the Court of first instance dismissing the plaintiffs' suit. The plaintiffs will pay the defendants' costs throughout.

Appeal accepted.

No. 61.

Before Hon. Mr. Justice Shah Din.

SHIB DIAL—(PLAINTIFF)—APPELLANT,

*Versus*MATHRA DAS AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 634 of 1913.

Custom—succession—Bhandari Khatri of Mauza Jalalabad, Amritsar District—Hindu Law.

Held, that the defendant-vendee on whom the initial *onus probandi* lay had proved that Bhandari Khatri of Mauza Jalalabad in the Amritsar District are, in the matter of succession, governed by the ordinary agricultural custom, and not by Hindu Law.

60 P. R. 1895 (1) and 107 P. R. 1901 (2), distinguished.

Second appeal from the decree of Major B. O. Roe, Divisional Judge, Amritsar Division, dated the 21st January 1913.

Tek Chand, for Appellant.

Nanak Chand, for Respondents.

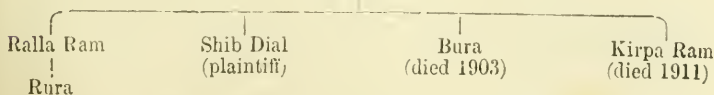
The Judgment of the learned Judge was as follows :—

SHAH DIN, J.—A return has now been received to this 17th Jan. 1916. Court's order of remand dated the 22nd December 1914. Both the Munsif, who conducted the enquiry, and the District Judge, through whom the record has been resubmitted to this Court, have concurred in holding that in the matter of succession the parties are governed by ordinary agricultural custom and not by their personal law, and that therefore the plaintiff Shib Dial, though a nearer reversionary collateral of Chamman Mal, vendor, would exclude the remote reversioner Mathra Das, vendee, from succession to the land in suit.

The District Judge has discussed in his return five instances of succession among the Bhandari Khatri of Jalalabad as disclosed by mutation entries in the revenue records of the village; and he has shown that in each of these instances the collaterals of the male proprietor concerned succeeded to the landed property according to the rule of representation recognised by custom and that the nearer collateral did not exclude the more remote.

Two of the instances relate to the family of the parties. The following pedigree table is material :—

SUBE RAI.

(1) 60 P. R. 1895 (*Mussammat Pal Devi v. Fakir Chand*).(2) 107 P. R. 1901 (*Harnam Singh v. Devi Chand*).

Bura died in 1903 leaving two brothers, Shib Dial, who is plaintiff in the present case, and Kirpa Ram, and a nephew Rura. The land left by Bura was mutated in the names of all three in equal shares. This is the first instance of succession in the family. The second instance is that of succession to the land left by Kirpa Ram who died in 1911. His estate was mutated in the names of Shib Dial, plaintiff, and his nephew Rura in equal shares. The remaining three instances relate to the village in which the parties reside, and the facts as stated by the District Judge by reference to the several pedigree tables given in his return have not been disputed before me.

We may, therefore, take it as proved that there are no less than five authenticated instances of succession to landed property among the Bhandari Khattris of Jalalabad which show that in the matter of inheritance relating to land they are governed by custom and not by Hindu law. The plaintiff has been unable to cite one single instance to show that the Hindu law of succession has ever been followed either in his own family or among other families of Bhandari Khattris in Jalalabad so far as succession to landed estate is concerned. The only criticism of the above mentioned instances that has been made by the plaintiff's learned pleader is that the collaterals who are said to have succeeded together to the landed estate of the male proprietor concerned in each of those instances might have been members of a joint Hindu family, and that as such they would succeed equally irrespective of the nearness or remoteness of their relationship to the male proprietor. No such suggestion appears to have been made in the Courts below even as regards the two instances in his own family in which the plaintiff Shib Dial was directly concerned, and I cannot give any weight to his learned pleader's argument relating to this part of the case.

It is next contended by him, on the authority of 60 *P. R.* 1895 (1) and 107 *P. R.* 1901 (2), that Bhandari Khattris follow Hindu law and not agricultural custom, and that the few instances proved and relied upon by the opposite party in this case are insufficient to establish the applicability of custom regarding succession to landed property among members of this tribe. Now, 60 *P. R.* 1895 (1) was a case in which the parties were Bhandari Khattris of Batala in the Gurdaspur District, and it was held by this Court that they

(1) 60 *P. R.* 1895 (*Mussammat Pal Devi v. Fakir Chand*).

(2) 107 *P. R.* 1901 (*Harnam Singh v. Devi Chand*).

followed Hindu law under which the widow of the last male proprietor was entitled for her life to a share equal to that of a son of the proprietor upon the estate being divided among the sons. The actual decision has, therefore, no bearing upon the present case. But it was observed that in a case in which the parties are by caste Hindus of good position and residents of a town, and, though holding land, non-agriculturists, depending for their livelihood on avocations other than cultivation of land, while the Courts should see in the first instance whether there is any custom bearing on the question in issue relating to inheritance, alienation, etc., no presumption should be made in favour of the existence of such custom, which will have to be established by the evidence of the parties. This principle was followed in 107 P. R. 1901 (1), which was a case of an alienation among the Bhandari Khatri of Verowal, a town in Tarn Taran *tahsil*; and it was there held that upon the evidence adduced in that case the plaintiff had failed to establish that a sonless Bhandari Khatri of Verowal was governed by custom prohibiting alienation by him of ancestral land without the consent of the collaterals.

The principle underlying the above-mentioned decisions is now well established, namely, that each case of alleged custom has to be decided primarily upon the proof actually adduced in that case and not upon *a priori* grounds; and that where the parties concerned are high caste Hindus not depending for their subsistence on agriculture the presumption in the first instance is in favour of the applicability of Hindu law to the exclusion of custom.

In the present case the initial burden lay on the defendant-vendee of proving that the parties were governed by custom and not by Hindu law; but I agree with the Courts below that he had discharged that *onus*, and it must be held that in matters of succession to landed estate custom applies to the parties and not their personal law.

It follows from the above finding that the plaintiff's right of pre-emption in respect of the land sold is not superior to that of Mathra Das, the second vendee; and I accordingly maintain the decree of the Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

(1) 107 P. R. 1901 (*Harnam Singh v. Devi Chand*).

No 62.

*Before Hon. Mr. Justice Shadi Lal and Hon. Mr Justice
Leslie Jones.*

KANHAYA LAL—(DEFENDANT)—APPELLANT,

Versus

ALLIANCE BANK OF SIMLA, LIMITED —
(PLAINTIFF).

Civil Appeal No. 2540 of 1914.

Mortgage—payable by instalments and also repayable 90 days after demand—rights of mortgagee in regard to unpaid instalment and in regard to recovery of whole mortgage debt.

The plaintiff Bank sued on 16th April 1914 for the recovery of the whole amount due under a mortgage deed dated 14th November 1912 for Rs. 15,000 which was to be repaid by 5 annual instalments of Rs 3,000 each beginning on the 1st January 1914. Defendant-mortgagor had failed to pay the first instalment. The deed contained a provision that the mortgagor will, 90 days after demand, pay to the Bank or its assigns the amount for the time being owing by the mortgagor to the Bank in account to be made up with interest and all other legal charges.

Held, that under the terms of the mortgage deed the Bank was entitled to sue for the amount of each unpaid instalment as soon as it fell due and that the provision (cited above) conferred on the Bank the further right to call up the whole amount of the debt, whenever it thought fit and whether or no there had been any default on the part of the mortgagor, 90 days after demand.

But held also, that as there had been no final demand for the payment of the whole debt 90 days before the institution of the suit, a decree could only be passed for Rs. 3,000 the amount of the unpaid instalment plus interest thereon—notwithstanding that defendant in not paying the instalment had failed to carry out the terms of the mortgage contract.

I. L. R. 26 Bom. 241, (1), distinguished.

*First appeal from the decree of C. L. Dundas, Esquire, District
Judge, Delhi, dated the 22nd July 1914*

Balwant Rai and Sardha Ram, for Appellant

B. Bevan-Petman and Wazir Singh, for Respondent.

The Judgment of the Court was delivered by :—

19th Jan. 1916.

LESLIE JONES, J.—On the 14th November 1912 the defendant Kanhaya Lal of Delhi mortgaged a house with outbuildings to the Alliance Bank of Simla, Limited, in lieu of a sum of Rs. 15,000 bearing interest at 7 per cent. per annum with six-monthly rests. According to the terms of the deed the principal was to be repaid in five annual instalments of Rs. 3,000 each, beginning on the 1st of January 1914. Before

(1) (1901) *I. L. R. 26 Bom. 241, (Venkatarao Krishnappa v. Mahableshwar).*

the first instalment fell due the defendant had begun to ask for an extension of time. This request was refused by the Bank which instituted the present suit on the 16th of April 1914 for the whole sum then due on the footing of the mortgage with interest at the same rate until realization of the decree.

The District Judge of Delhi has granted the plaintiff a decree for the sum of Rs. 17,671 principal and interest at Rs. 7 per cent., calculated up to the 22nd of October 1914 with further interest at the rate of Rs. 6 per cent. per annum after that date until realization, with full costs.

The defendant has now appealed to this Court.

The deed which is in the form of an English mortgage contains a provision that the mortgagor will, 90 days after demand, pay to the Bank or its assigns the amount for the time being owing by the mortgagor to the Bank in account current to be made up with interest and all other lawful charges.

It has been contended on behalf of the defendant that according to this provision the Bank was not entitled to claim even the amount of the first instalment until 90 days after demand. We have, however, no difficulty in finding that the Bank was fully entitled to sue the amount of each unpaid instalment as soon as it fell due and that the provision in question is one which confers on the Bank the further right to call up the whole amount of the debt whenever it thought fit and whether or no there had been any default on the part of the mortgagor 90 days after demand.

We are equally clear that there was no subsequent oral agreement extending the time for the payment of the first instalment and also that there has been no waiver on the part of the defendant-appellant of any right which he may have possessed under the deed.

The first question of importance is whether the Bank had demanded the whole sum due on the footing of this mortgage 90 days before the institution of the suit. For the plaintiff-respondent it is contended that such demand was made in two letters dated the 25th of November 1913 and the 7th of January 1914, respectively. The first of these letters was in reply to a request by the defendant for an extension of time. It refers particularly to the instalment of Rs 3,000 due on the 1st of January 1914 and closes with the following sentences :—
“ We insist upon your instalment, &c, being paid as per your
“ bond, and unless you pay the same on due dates (sic) your

“loan account will at once be called up Please acknowledge receipt of this letter.” The second letter dated the 7th of January 1914 runs as follows :—

“*Re instalment P Rs. 3,000 due on your loan account on the 1st current and interest Rs. 763-5-3 accrued to 31st December last.*”

“As you have failed to pay the above we write to say that unless you pay the amount due by the 15th current a suit will be filed against you without further notice.”

“Kindly own receipt of this notification.”

We are unable to read these letters as containing a demand for the whole amount of the debt. What they contain rather is a threat that if the first instalment was not paid the whole debt would then be called up, and it is admitted by counsel for the plaintiff-respondent that if the first instalment had been satisfied, the whole amount of the debt would not have been claimed

That the view which we take regarding the contents of these letters is correct is indicated by a letter dated 19th of March 1914 despatched by the pleader for the Bank to the defendant in which the defendant was given what is described as a final notice that unless the first instalment *plus* interest is paid within a week the plaintiff Bank would file a suit for the recovery of the whole debt.

In our opinion, then, no final demand was made for the payment of the whole debt 90 days before the institution of the suit. There was merely a conditional notice and although we have asked counsel for the plaintiff-respondent to supply us with some authority for holding that such conditional notice is tantamount to an absolute demand he has failed to do so. We hold therefore that the terms of the deed as regards the making of a demand 90 days before the institution of the suit have not been complied with.

Counsel for the plaintiff-respondent has two further arguments with which it is necessary to deal. According to the terms of the deed the Bank is entitled to bring the whole property to sale without notice if the whole or part of any instalment has fallen into arrears for one calendar month. It is contended that this provision enables the Bank to neglect the earlier provision regarding 90 days' demand. Counsel for the appellant urges, on the other hand, that by reason of the provisions of section 69 of the Transfer of Property Act this condition in the mortgage is invalid. That contention however

we do not propose to discuss for this reason that even if it be granted that the full terms of the English mortgage in dispute are enforceable in the Punjab, we are still of the opinion that the condition in question is not one on which the plaintiff-respondent is able to rely for the purposes of the present suit, as the right which this condition gives to the plaintiff is merely a right of private sale. The plaintiff has not even asked the Court to enforce that right but has elected rather to sue for the amount of the mortgage debt and having done so we consider that he is bound by the provisions of the deed which relate to such recovery.

The last argument of counsel for the plaintiff-respondent is that as the defendant-mortgagor has failed to carry out the terms of the mortgage contract, the Bank is entitled to put an end to the contract and to call up the whole amount of the debt although the remaining instalments have not fallen due. In support of this argument he has cited 26 Bom. 241 (1), but an examination of that ruling shews that the Bombay High Court were dealing with very different facts. The defendant in that case had mortgaged ten fields to secure payment of certain debt payable after 15 years, but subsequently it turned out that he had no title to six of the fields. He not only failed to pay the stipulated interest as agreed upon but also he had failed to furnish the plaintiff with the whole of his security. In those circumstances the Bombay High Court held that the plaintiff was entitled to bring the mortgaged property to sale notwithstanding that the term of 15 years had not expired. We do not think that this case is one which can have any bearing on the appeal now before us.

We hold then that in the present suit the plaintiff Bank was only entitled to claim the amount of the first instalment *plus* the interest due on the whole debt up to the date of the institution of the suit. The plaintiff-respondent has not appealed against the decision to allow interest at the rate of only Rs. 6 per cent. per annum after that date until realization.

Accordingly we accept the appeal to this extent that the plaintiff will get a decree for the sum of Rs. 3,000 principal, with interest calculated with six monthly rests at the rate of Rs. 7 per cent. per annum from the 14th of November 1912 up to the date of the institution of the suit, *plus* interest on the total at the rate of Rs. 6 per cent. per annum after that date until realization.

(1) (1901) *I. L. R.* 26 Bom. 241 (*Venkatarao Krishnappa v. Mahableshwar*).

Having regard to the whole circumstances of the case we further order that the parties do bear their own costs throughout.

Appeal accepted.

No. 63

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Leslie Jones.*

MUSSAMMAT SARDAR BEGAM—(DEFENDANT)—
APPELLANT,

Versus

MUHAMMAD SHARIF AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 2087 of 1913.

Second appeal—law point—question whether consent of plaintiffs' fathers was bona fide or not—cause of action for a declaratory suit—whether welfare of estate has been threatened—pleas.

M. S., M. H. and M. Hf., 3 brothers, held an estate in equal shares—on the death of M. Hf. his widow succeeded to a life interest in his share. In 1910 a part of the estate was acquired by Government under the Land Acquisition Act, the widow's share amounting to Rs. 6,115 which amount was paid to the widow in cash with the consent of her brothers-in-law in disregard of section 32 of the Land Acquisition Act. Plaintiffs the minor sons of M. S. and M. H. brought the present suit for a declaration that the widow is only entitled to use by way of maintenance the income of the sum received by her as compensation and that after her death plaintiffs shall be entitled to the capital, &c. Both, the first Court and the lower Appellate Court, decreed plaintiffs' claim and defendant preferred a second appeal to the Chief Court.

Held, that the question whether the consent of plaintiffs' fathers was given *bona fide* (as found by the lower Courts) was one of fact and not of law and could not be reopened in second appeal.

Held also, that in the face of plaintiffs' allegation in their plaint, viz. that defendant sets herself up as full owner and threatens to use the capital and the reply of defendant to the effect that plaintiffs have no rights in the property and she herself has every right to spend properly the compensation money awarded to her, it could not be said that plaintiffs had no cause of action for their suit.

1 W. R. 125 (1), 47 P. R. 1884 (2) and I. L. R. 22 Mad. 126 (3), distinguished.

(1) (1861) 1 W. R. 125 (*Bindoo Bassinee Dossee v. Bolie Chand Seth*).

(2) 47 P. R. 1884 (*Mussammat Prab Devi v. Harkishn Das*).

(3) (1898) I. L. R. 22 Mad. 126 (*Subba Reddi v. Chengalamma*).

Second appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore, dated the 10th June 1913.

Muhammad Shafi, for Appellants.

Oertel and Nabi Bakhsh, for Respondents.

The Judgment of the Court was delivered by :—

LESLIE JONES, J.—Muhammad Shafi, Muhammad Hafiz 21st Jan. 1916. and Muhammad Hanif were three brothers holding an estate in equal shares. On the death of Muhammad Hanif his widow Mussammat Sardar Begam succeeded to a life interest in her husband's share of the estate. In 1910 a part of the estate was acquired by Government under the Land Acquisition Act, the widow's share amounting to R. 6,115 2-3.

In spite of the provisions of section 32 of the Land Acquisition Act this sum was paid to the widow in cash by the Land Acquisition Officer with the consent of her brothers-in-law.

The present suit was instituted by the minor sons of Muhammad Shafi and Muhammad Hafiz for declarations that the widow is only entitled to use by way of maintenance the income of the sum which she received as compensation and that after her death the plaintiffs shall be entitled to the capital, and for injunctions restraining the defendant from using the capital during her life and requiring her to deposit the amount in some Bank to be selected by the Court, or to so invest it that there will be no danger of its being used or squandered during defendant's life-time. The plaintiffs obtained a declaration that the defendant was only entitled to deal with the property in question in the same way as she was entitled to deal with the land, an injunction prohibiting her from dealing with it otherwise, and a further injunction directing her to deposit or invest the amount as prayed by the plaintiffs.

The defendant preferred an appeal to the Divisional Judge who maintained the decision of the first Court and the defendant has now lodged a second appeal in this Court.

The learned advocate for the defendant-appellant has argued two points only. The first is that the plaintiffs-respondents were bound by the consent of their fathers.

Both Courts have found as a fact that the consent of the plaintiffs' fathers was not given *bona fide*. But Mr. Shafi contends that a wrong inference has been drawn from the facts in evidence and that therefore he is able to argue this question on second appeal as a point of law. With that contention we do not agree, but even if the case could be so argued, we have

no hesitation in saying that in our opinion the decision of the lower Courts on the question of fact was perfectly correct. It is no doubt true that the fathers of the plaintiffs were not actuated by any desire to injure their sons, but at the same time their action in consenting to allow this large sum to be made over to their brother's widow in direct contravention of the provisions of the Act was so wholly unreasonable that it is impossible to regard their consent as being of *bona fide* character. We agree therefore with the lower Courts that the plaintiffs are not estopped from suing by their fathers' consent.

Mr. Shafi's second point is that, even if it be granted that the plaintiffs are not so bound, the mere fact that their fathers consented to allow the widow to receive the compensation in cash provides the plaintiffs with no cause of action provided that the welfare of the estate has not been threatened by the widow, and in support of this proposition he has cited 1 W. R. 125 (1) ; 47 P. R. 1884 (2) and 22 Mad., 126 (3). In the abstract no doubt this proposition is quite correct. The plaintiffs have no more right to bring a suit regarding this money than they would have had if the property had remained in the shape of land. The argument, however, fails when we come to look at the facts. It was stated in paragraph 9 of the plaint that the defendant denies that the plaintiffs have any right, present or reversionary in the property and that she sets herself up as the full owner and threatens to use the capital. It is true that no evidence to this effect was tendered in Court, but it was unnecessary in view of the terms of paragraph 9 of the pleas. The defendant there asserted that the plaintiffs had no rights in the property and that she herself had every right to spend properly the compensation money which she had been awarded. Having regard to the text we are unable to hold that by the word 'properly' she meant merely that she was entitled to spend the capital for necessity of the kind which would justify her in alienating land ; and we think that it is clear from her own pleas that she had in fact set up an absolute title and threatened to use the capital in a manner which would not be warranted by custom, and in view of the attitude which she has taken we are of the opinion that the decree granted by the District Judge is no more than is required to safeguard the property in the interest of the reversioners.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 1864, 1 W. R. 125 (*Bindoo Bassinee Dossee v. Bolie Chand Seth*).

(2) 47 P. R. 1884 (*Mussummat Prab Devi v. Harkishn Das*).

(3) (1898) I. L. R. 22 Mad. 126 (*Subba Reddi v. Chengalamma*).

No. 64.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Leslie Jones.*

VIR SINGH AND OTHERS—(PLAINTIFFS)—
PETITIONERS,

Versus

TIRATH RAM AND OTHERS—(DEFENDANTS) —
RESPONDENTS.

Civil Appeal No. 326 of 1911.

Civil Miscellaneous No. 484 of 1915.

*Civil Procedure Code, Act V of 1908, section 110 and order 45, rule 3—
application for leave to appeal to Privy Council.*

Where the decree of the Chief Court affirmed the decision of the Court immediately below and the decision of both Courts, was based solely on the facts which were held to be established although this involved the decision on a point of limitation in respect of a small portion of the property in dispute.

Held that, as no substantial question of law was involved in the proposed appeal to His Majesty in Council within the meaning of section 110 of the Code of Civil Procedure and the case was not "otherwise" a fit one for such an appeal under order 45, rule 3, the application for a certificate must be rejected.

*I. L. R. 23 All. 91 (1) and I. L. R. 23 All. 227 (231) (P. C.) (2), referred to.
Petition under order XLV, rules 2 and 3 of the Civil Procedure
Code for grant of a certificate to prefer an appeal to His Majes-
ty in Council against the judgment and decree of the Chief
Court, dated the 4th June 1915.*

Ralli, for Petitioners.

Beechey, for Respondents.

The order of the Court was delivered by—

RATTIGAN, J.—The petitioners apply under order XLV, rule 21st Jan. 1916. 3, of the Civil Procedure Code for a certificate that this case fulfils the requirements of section 110 of the Code, or that it is otherwise a fit one for appeal to His Majesty in Council, and Mr. Beechey, on behalf of respondents, contests the right of petitioners to any such certificate.

In our opinion, the respondents' contention must prevail. The value of the property (which plaintiffs-petitioners themselves in the first instance estimated at Rs. 1,100) has no doubt been found to be Rs. 20,600, but the decree of this Court affirmed the decision of the Court immediately below and the appeal to His Majesty in Council involves no "substantial question

(1) (1900) I. L. R. 23 All. 91 (*Banke Lal v. Jagat Narain*.)

(2) (1900) I. L. R. 23 All. 227 (231) (P. C.) (*Banarsi Prasad v. Kash
Krishna Narain*).

of law." the decision of both Courts being based solely on the facts which were held to be established. The "grounds of appeal" as set forth in the petition for grant of a certificate do not disclose any such substantial question of law, except possibly that part of ground No. (6) which alleges that "their title "to plot No. 4 was not barred by time." Apart from the objection that this plot which is merely one of several in dispute, is of value for short of Rs. 10,000, we find that the decision of this Court as regards plaintiffs' claim to it proceeded on the ground that petitioners (who were plaintiffs in the suit) had failed to prove their allegations that their possession dated from 1887 and continued to 1898, and that they were not entitled at a late stage of the case to shift their ground by asserting that, though they were not (as they originally asserted) themselves in possession up to 1898, Charan Singh was in possession as manager or trustee on their behalf. But the decision of this Court went further, it being held that even if plaintiffs had not lost their rights "by defendants' adverse possession, their title had been lost by acquiescence, inasmuch as (1) they must have known of the defendants' possession and had nevertheless stood by and allowed him without objection to erect buildings which had enormously increased the value of the property, and (2) they had after the institution of the present suit, instituted another suit (which has also been dismissed) for pre-emption of the property sold by Charan Singh to defendant in 1899.

In these circumstances, following the decision of the Allahabad High Court in *Banke Lal's case* (*I L R. 23 All 94*) (1), we hold that no substantial question of law is involved in the appeal and as the case is not in our opinion, regard being had to the *dicta* of their Lordships of the Privy Council in *Banarsi Prasad's case* (*I L R 23 All. at page 231*) (2), "otherwise" a fit one for appeal to His Majesty in Council, we decline to grant the certificate prayed for. It is, of course, open to the petitioners if so advised, to apply direct to His Majesty in Council for leave to appeal from the judgment of this Court.

The application is dismissed with costs.

(1) (1900) *I. L. R. 23 All. 94* (*Banke Lal v. Jagat Narain*).

(2) (1900) *I L R. 23 All. 227 (231)* (P. C.) (*Banarsi Prasad v. Kashi Krishna Narain*).

No. 65.

Before Hon. Mr. Justice Shadi Lal.

GOKAL CHAND AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MILKHI AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1452 of 1915.

Custom—adoption—Brahmans of Mauza Nurpur, Tahsil Garhshankar, District Hoshiarpur—collateral succession by adopted son—Hindu Law—Res judicata—nominal defendant in previous suit.

Held, that where a formal adoption has been made by a Brahman of Mauza Nurpur, Tahsil Garhshankar, District Hoshiarpur, the adopted son succeeds collaterally in the adoptive family, and that the fact that the Brahmans of this village form a compact community and till land with their own hands does not constitute an adequate reason for holding that the institution of adoption among them has lost all religious significance.

Held also, that a decision arrived at in a previous suit cannot operate as *res judicata* against the person who was in that suit merely a nominal defendant.

60 P. R. 1894 (1), 41 P. R. 1899 (2) and I. L. R. 25 Bom. 589 (3), referred to.

First appeal from the decree of E. T. Bhan, Esquire, District Judge, Hoshiarpur, dated 27th February 1914.

Tek Chand, for Appellants.

Duni Chand and Umar Bakhsh, for Respondents.

The Judgment of the learned Judge was as follows :—

SHADI LAL, J.—The dispute in this appeal relates to the 24th Jan 1916 property of one, Harbhaj, a Brahman of Mauza Nurpur, Tahsil Garhshankar of the Hoshiarpur District, the succession to whose estate opened out on the death of his widow, Mussammat Uttam Devi. The plaintiffs contend that in the matter of succession to Harbhaj, the defendant Milkhi, the adopted son of Diwana, should be treated as a son of his natural father and is, according to custom, precluded from inheriting collaterally in the adoptive family. This contention has been rejected by the District Judge, and the appeal preferred by the plaintiffs impugns the correctness of his decision.

Before dealing with this question, it is necessary to consider the plea of *res judicata* raised by the appellants for the first time in this Court. It appears that in June 1913 the present plaintiffs brought an action for the recovery of certain houses against Mussammat Uttam Devi's brother's sons, and in that suit Milkhi was impleaded as a defendant and his allegation, that he was entitled to succeed collaterally, was not

(1) 60 P. R. 1894 (*Zaman Ali v. Manji*).

(2) 41 P. R. 1899 (*Lalbu v. Hira Singh*).

(3) (1901) I. L. R. 25 Bom. 533 (*Ram Das v. Vazirshah*).

accepted by the Courts. Now, it is clear that Milkhi was not in possession of any property then in dispute, and no relief was claimed against him. He was not a necessary party to the suit which could have proceeded without impleading him as a defendant. In these circumstances, the principle of law is well established that a decision arrived at in a previous suit cannot operate as *res judicata* against the person who was in that suit merely a nominal defendant, *vide inter alia* 60 P. R. 1894 (1), 41 P. R. 1899 (2) and 1 L. R. 25 Bom. 589 (3).

Coming now to the merits of the issue in controversy, I consider that all the circumstances point to the conclusion that the adoption in question was a formal one, and not a mere appointment of an heir. The parties are Brahmans and Milkhi was Diwana's brother's grandson. It is beyond dispute that Diwana lived with Milkhi's father and that their holding was joint. In 1890 he executed a deed of adoption reciting therein a formal adoption many years previously, and though there may be some exaggeration in the details as to the adoption, I am inclined to think that the ceremony of giving and taking did as a matter of fact, take place. Upon the record there is some oral evidence to that effect, and though it is not very satisfactory, it must be remembered that the transaction took place many years ago, and that oral evidence of a convincing nature can hardly be expected after the lapse of more than a quarter of a century. The probabilities of the case are entirely in favour of Milkhi's contention, and I do not think that the circumstance, that the Brahmans of this village form a compact village community and till the land with their own hands, constitutes an adequate reason for holding that the institution of adoption among them has lost all religious significance and has become a purely secular affair.

My view then is that Milkhi's adoption by Diwana was performed in accordance with the usual ceremony observed in such cases, and upon that finding there is no question that he is entitled to succeed collaterally in the adoptive family. The general rule is in his favour, and we have, further, a judicial instance, *viz.*, the judgment of Commissioner, dated the 9th January 1883, which decides the question of collateral succession in favour of adopted son.

For the aforesaid reasons I affirm the decree of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 60 P. R. 1894 (*Zaman Ali v. Manji*).

(2) 41 P. R. 1899 (*Labhu v. Hira Singh*).

(3) (1901) 1 L. R. 25 Bom. 589 (*Ram Das v. Vazirshahib*).

No. 66.

*Before Hon. Mr. Justice Rattigan and
Hon. Mr. Justice LeRossignol.*

GOPAL SINGH—(PLAINTIFF)—APPELLANT,

Versus

GANPAT RAI AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2148 of 1915.

Civil Procedure Code, Act V of 1908, order 21, rules 58 and 63—res judicata—fresh application for sale and proclamation—whether new cause of action.

Plaintiff, the son of a judgment-debtor whose property had been attached in execution of a decree had preferred an objection which was rejected summarily by reason of its belated appearance. He had then brought a regular suit for a declaration but that suit was dismissed for default in December 1912. Owing to failure to secure an adequate bid the decree-holder in 1912 had withdrawn his execution but presented a fresh application for sale by auction in 1915 and proclamation of sale was made. Plaintiff then brought the present suit for the same declaratory relief as in the 1912 case.

Held, that the suit was barred by time (article 11, Limitation Act) and that the fresh proclamation of 1915 furnished no fresh cause of action which was the same as in the previous suit of 1912, *viz.*, the attachment and proclamation of auction and that, as the previous suit in 1912 was not proceeded with or withdrawn with leave to bring another suit, the order rejecting plaintiff's objection was now conclusive under rule 63 of order 21 of the Code of Civil Procedure, which modifies the old law of section 283 of the Code of 1882 and applies to all objections by *third parties*.

27 *Indian Cases* 944 (945) (1), referred to.

First appeal from the decree of Rai Achhru Ram, Subordinate Judge, 1st Class, Lahore, dated the 12th July 1915.

Broadway, for Appellant.

Muhammad Shafi, Beechey and Tek Chand, for Respondents.

The judgment of the Court was delivered by—

LEROSSIGNOL, J.—The respondent Ganpat Rai on 31st July 25th Jan, 1916. 1907 obtained a decree for monies secured on the property now in dispute and attached it in August 1910, whereupon the judgment-debtor Bhagat Singh raised objections which were dismissed on 22nd May 1911 and the executing Court proceeded to sell the property.

Then in November 1911 the son of the judgment-debtor who is the plaintiff in this case preferred an objection under

(1) (1914) 27 *Indian Cases* 944 (945) (*Narasimha Chetti v. Vijayapala Nainar*).

order 21, rule 58 which was summarily dismissed by reason of its belated appearance.

He then brought a regular suit for a declaration that the property was not liable to attachment and sale in execution of the decree against his father, but that suit was dismissed for default in December 1912.

The decree-holder owing to failure to secure an adequate bid in 1912 had at that date withdrawn his execution, but presented a fresh application for sale by auction in 1915, and proclamation of sale was made.

Plaintiff again comes into Court, alleging that the proclamation of 1915 gives him a fresh cause of action, and asking for the same declaratory relief as in the 1912 case.

The Court below has dismissed the suit on the ground that it is barred by order 9, rule 9 and by article 11 of the Limitation Act.

We have no doubt that the appeal must fail. The fresh proclamation of 1915 furnished no fresh cause of action, the cause of action in 1915 as in 1912 was the threat levelled against plaintiff's title, the attachment and proclamation of auction connoting and importing a denial of any right of the plaintiff.

The plaintiff was not bound to take any action at all on this mere threat, but having preferred an objection and failed therein, he was bound to bring a regular suit within one year of that failure, and having brought a regular suit, he was bound to proceed with it, or withdraw it with leave to bring another suit.

As has been pointed out in 27 *I. C.* pages 944—945 (1) the Code of 1908 has introduced a modification into the old law and any order on an objection made by a third party to attachment of property in execution of a decree is now conclusive, whether that order was passed summarily or after investigation.

The alteration in the Code was accompanied by a significant parallel alteration in the Limitation Act, article 11.

Thus the objection of the plaintiff was rejected in 1912, and this suit is not brought within one year of that order of rejection, and that though there can be no doubt but that the matter agitated is the same. The suit is time-barred.

(1) (1914) 27 *Indian Cases* 944 (945) (*Narasimha Chetti v. Vijiapala Nainar*).

It is barred also by order 9, rule 9 for in both cases the cause of action, *viz.*, the threatened annihilation of plaintiff's asserted right, is the same.

The appeal is dismissed with costs.

Appeal dismissed.

No 67.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

SECRETARY OF STATE FOR INDIA—APPELLANT,

Versus

JIWAN BAKHSH—RESPONDENT.

Civil Appeal No. 1252 of 1914.

Land Acquisition Act, I of 1894, section 18—application to Collector to refer matter to Court—what it should contain in regard to grounds on which objection is taken—Collector acts judicially and his orders are subject to revision by Chief Court.

Held, that a Collector making a reference or refusing to make a reference under section 18 of the Land Acquisition Act is acting judicially, and his proceedings are therefore subject to revision by the Chief Court.

Held also, that if in his application an owner says "I object to the award of the Collector and I wish a reference to be made to the Court" and then adds in connection with one item of the property that the compensation paid for the different classes of land is very low and also adds in connection with another item of the property that the compensation for the wells and other buildings is too low, *he does give grounds* for the reference within the meaning of section 18 (2) of the Act.

I. L. R. 30 Bom 275 (1), disapproved in this respect.

Miscellaneous first appeal from the order of C. L. Dundas, Esquire, Divisional Judge, Delhi, dated the 5th of March 1914.

Additional Government Advocate and Mool Chand, for Appellant.

Abdul Ghani, for Respondent.

The judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—These two cross-appeals are 27th Feb. 1916. connected with a land acquisition case in Delhi. The owner of the property which has been taken up by Government is Sheikh Jiwan Bakhsh. The land in dispute is 11·15 acres with a certain number of trees, two wells, one *kothi* and one platform. The Collector's award, the details of which will be found in the judgment of the lower Court, amounted to Rs. 3,497-15-3

(1) (1905) *I. L. R. 30 Bom 275* (In the matter of the Land Acquisition Act.)

whereof Rs. 456-4-1 was the statutory 15 per cent. always added to the estimate of the market value. For the land, etc., actually in question now, the owner claims about Rs. 9,000. In applying to the Collector to make a reference the owner said :—

“(1) The garden should have been valued as such and the “land and trees should not have been valued separately.”

“(2) The applicant bought the land at various times after “1904 for Rs. 5,375 and spent Rs. 3,000 in building a *kothi*. “The market value is now Rs. 10,000 out of which the amount “awarded for the *abadi* should be deducted.”

“(3) The compensation paid for the different classes of “land is very low.”

“(4) The compensation for the wells and other buildings is too low.”

“(5) The compensation for the trees is low. There are “525’ trees about and only 372 were paid for.”

The Collector relying upon *I L. R. 30 Bom. 275* (1), held that the reference was an imperfect one, that no grounds were given with reference to paragraphs (3) and (4) above and that therefore no reference could be made on those matters. The learned Divisional Judge, however, took a different view of the Collector’s powers and duties and held that the ruling quoted did not apply and that he (the Divisional Judge) was fully justified in considering all the grounds laid before him for enhancement of the figure allowed. In the end the Divisional Judge, after carefully discussing the whole case, came to the conclusion that two items of the property had been underestimated by the Collector, namely the orchard and the house, the deficiency in each case being put by him at about Rs. 500.

* * * * *

Next, it is contended that the lower Court was wrong in holding that it had jurisdiction to go beyond the reference. This contention seems to me wholly incorrect. It has been ruled more than once that a Collector, making a reference or refusing to make a reference, is acting judicially, and therefore his proceedings are subject to revision by the High Court. No doubt the *Divisional Judge* had no power of revision, but I think in the present case, apart from the question of jurisdiction, the Divisional Judge acted prudently and wisely in listening to any and every objection put forward by the owner. As the case is now before the High Court it would be pedantic to set aside the lower Court’s proceedings on any such grounds as are urged. The reason why I think that the lower Court was

(1) (1905) *I. L. R. 30 Bom. 275* (*In the matter of the Land Acquisition Act.*)

right in entertaining objections as to paragraphs (3) and (4) is this, that I do not at all agree in the *dictum* in the Bombay ruling relied upon by the Crown, or rather in the Collector's interpretation of it. When an owner says "I object to the award of the Collector and I wish a reference to be made to the Court," and then adds in connection with one item of the property that the compensation paid for the different classes of land is very low and also adds in connection with another item of the property that the compensation for the wells and other buildings is too low, in my opinion he *does give grounds* for the reference. Indeed I am unable to see how the Act requires anything further from him on this point.

[The remainder of the judgment is not required for the purposes of this report.—Ed.].

Appeal dismissed.

No. 68.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

DIWAN CHAND—(PLAINTIFF)—APPELLANT,

Versus

SUNDAR—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 2698 of 1914.

Punjab Courts Act, III of 1914, section 41 (1)—second appeal—whether a question involving the interpretation of a document is one of law or fact.

Held, that the question involved in this case being "whether M gifted *shamilat patti* to D. or not" was one of fact and the circumstance that in deciding that question one had to interpret a document did not alter the question into one of law and consequently no second appeal was competent.

As to when a question involving the interpretation of a document is one of law, explained.

Second appeal from the decree of H. A. Rose, Esquire, Divisional Judge of the Siulkot Division, dated the 28th of July 1914.

Kishen Chand, for Appellant.

Diwan Mehr Chand, for Respondent.

The judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—In this case it appears that in the year 1891 one Mutsaddi gifted land to his near kinsman Dharma, father of the plaintiff. The only evidence relied upon in argument before me is documentary, namely, mutation with reference to the aforesaid gift and the succeeding *jamabandi* papers. The first Court decreed for the plaintiff, holding that

28th Jany. 1916.

the land in suit, which is *shamilat* of *patti Jagta*, was gifted along with the proprietary land. That Court seems to have relied mainly upon the *jamabandis*, using them as a guide in the interpretation of the mutation 'report' and order. The lower Appellate Court, however, took the view that the *jamabandi* entries are wrong, and that the mutation entry is quite clear and shows that no *shamilat patti* was gifted.

The suit having been thus dismissed, the plaintiff has filed a second appeal to this Court. The first reflection I have to make is that it is more than doubtful whether any second appeal lies at all. The issue at stake really is: Did Mutsaddi gift *shamilat patti* to Dharma or not? Stated so the issue covers obviously a mere question of fact and the circumstance that, in deciding that question, one has to interpret a document does not seem to me to alter the question to one of law.

It is often argued in this Court that interpretation of a document, and inference to be drawn from the wording of a document, are not matters of fact but of law. But this is by no means always the case. No hard and fast rule can be laid down. But an illustration will make clear my own general view on this matter. For instance, if the issue is: Was the transfer of the property in suit a mortgage or a sale? and if the question has to be decided upon the wording of a document, it may well be one of law; for, after the Court has decided the facts involved, it has still to say whether those facts create in law a mortgage or a sale.

Again, suppose the issue is: Did A *entrust* certain property to B? and this question has to be decided upon the wording of a document, it may well be again that the question is one of law. In such cases, before a decision can be arrived at, certain maxims and rules of law, either contained in Statutes or in rulings of Superior Courts, have to be invoked and applied; but in a case like the present we have nothing to look at at all, except the *actual intention of the donor, i.e.*, whether he did *intend* to give the *shamilat* to Dharma or not. We have not got here to discuss legal principles or maxims.

My opinion, therefore, is that it is a bare question of fact and no second appeal lies.

[The remainder of this judgment is not required for the purposes of this report.—ED.].

Appeal dismissed.

No. 69.

Before Hon. Mr. Justice LeRossignol.

AKBAR KHAN AND OTHERS—(PLAINTIFFS)—

APPELLANTS,

Versus

KHAN BAHADUR AND OTHERS—(DEFENDANTS)—

RESPONDENTS.

Civil Appeal No. 1247 of 1915.

*Custom—alienation—unrestricted power of Pathans of Mamanpur, Attock District—Wajib-ul-arz—Riwaj-i-am.**Held, that by custom among Pathans of Mamanpur in the Attock District there is no restriction upon alienation by a male proprietor.**First appeal from the decree of M. V. Bhile, Esquire, District Judge of Attock at Campbellpur, dated the 12th of November 1913.*

Bodh Raj Saberwal, for Appellants.

Fazl-i-Hussain, for Respondents.

The judgment of the learned Judge was as follows :—

LEROSSIGNOL, J.—By a will executed in February 1909 31st Jan. 1916. Shahanchi Khan left all his property to his great nephew Khan Bahadur, in whose favour mutation was sanctioned in February 1913 after the death of Shahanchi.

The plaintiffs are collaterals of Shahanchi in the third degree and they sue for the usual declaration to take effect after the demise of the testator's widow.

The lower Court has dismissed the suit finding that the property is not ancestral and that among the parties who are Pathans of Mamanpur in the Attock District, there is no restriction upon alienation by a male proprietor.

The finding on the second point seems to be very sound and correct and I need deal with that alone.

The *Wajib-ul-arz* of the Regular Settlement is very emphatic, the Pathans have an unrestricted power of alienation.

The *Riwaj-i-am* of the present Settlement states that a landowner may make a gift even in the presence of sons.

The defendants have also produced seven instances in which this unrestricted right was judicially ascertained, and in one of them (Banaras Khan *versus* Muhammad Amir and others) a very thorough local inquiry was made.

These instances the appellants' counsel has not attempted to counter, and the small number of two cases produced by

the appellant to support his case is a very poor reply both in quantity and quality.

Appellants' counsel has attempted to distinguish between a gift and a bequest. As held in 48 P. R. of 1903 (1), there is no distinction in principle between a power to gift and a power to bequeath.

However, the appellant is not entitled to raise that contention here for the first time, for the parties went to proof solely on the question whether the land was ancestral and whether a right of alienation existed.

I find that among these Pathans of Mamanpur, there is an unrestricted power of alienation of property and that the agnatic theory has no force among them.

The appeal is dismissed with costs.

Appeal dismissed.

No. 70.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Rattigan.*

CHIRAGH DIN—(DEFENDANT)—APPELLANT,

Versus

ALLAH DIN—(PLAINTIFF)—AND ANOTHER —(DEFENDANT),
RESPONDENTS.

Civil Appeal No. 801 of 1914.

Pre-emption—sale disguised as a gift—evidence of its being a sale.

The deed of transfer in respect of which pre-emption was sought, was in terms one of gift and according to these terms the gift (which comprised 12 kanals 2 marlas of land in Mauza B.) was made by N. as some return for the services rendered to him at various times by his near kinsman and very good friend C. D., and the deed also stated that the value of the property was Rs. 1,000. It was found, as a matter of fact, that C. D. was not in any way related to N. to whom he was in no way proved to be beholden, that N. had 6 sons of his own and was on good terms with them and that he was by no means a man of superfluous wealth—both the lower Courts found that the transfer was really one of sale.

I eld, that on the facts found the lower Courts were fully justified in holding that the transfer was really one of sale, though disguised as a gift.

117 P. R. 1890 (F. B.) (2) followed.

(1) 48 P. R. 1903 (F. B.) (*Mussammat Bano v. Fateh Khan*).

(2) 117 P. R. 1890 (F. B.) (*Tara Chand v. Baldeo*).

Second appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore, dated the 24th March 1914.

Fazl-i-Hussain, for Appellant.

Moti Lal, for Respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—It is unnecessary for us to re-state the facts which are set forth in the judgment of the Subordinate Judge. The sole question before us on this second appeal is, whether the deed of conveyance executed by Nathu on the 10th August 1910, is (as in terms it purports to be) a deed of gift in favour of defendant, Chiragh Din, or (as plaintiff pre-emptor alleges) in reality a deed of sale in the guise of a gift. 1st Feb. 1916.

Admittedly, the deed is in terms one of gift, and according to these terms the gift (which comprised 12 *kanals* 2 *marlas* of land in *Mauza Baghanwala*) was made by Nathu as some return for the services rendered to him at various times by his near kinsman and very good friend, Chiragh Din. The deed, somewhat naively and ingenuously, states incidentally that the value of the property is Rs. 1,000.

The Subordinate Judge and Divisional Judge have concurrently found that the alienation was not a gift but a sale, disguised as a gift in order to evade claims by pre-emptors and to enable the alienee to qualify as a candidate for the post of *lambardar*, and they are also agreed that the alleged relationship of the alienee with the alienor and the alleged services rendered by the former to the latter are mythical and unproved.

At the hearing before us Mr. Fazl-i-Hussain made no attempt to support the gift upon the grounds urged by his client in the Courts below, but opened up an entirely new case. The gift, he urged, was not intended to be a permanent transfer to the alienee, but was made, not out of gratitude to a near relation and dear friend who had rendered invaluable services to the alienor, but with the object of enabling the alienee to qualify for the post of *lambardar*, it being well understood between the parties that the transfer was to be of a temporary character and that the land was to be given back, immediately after the determination of the *lambardari* case, to the alienor. It is not for us to say whether a transaction of this kind should or should not be recognised as an honest, *bona fide* compliance with the rules relating to the appointment of *lambardars*, but that a practice of the kind exists is apparent from the ruling of the Financial Commissioner to which Mr. Fazl-i-Hussain

has referred us (see No. 1 P. R. 1913 (Rev.) (1)). This practice may exist and it may be that the Revenue authorities do not regard it unfavourably, but in the case before us we have no hesitation in saying that the plea now advanced in support of the so-called "gift" is a mere after-thought, devised to meet the obvious objection that after two Courts had concurred in holding that there was no foundation for the grounds upon which the "gift" was originally based, it would be idle for the alienee to ask us in second appeal to come to a different conclusion. Both Courts had found that there was no reason whatever why Nathu should have made a gift of a valuable part of his land to Chiragh Din inasmuch as the latter was not related to him and had not rendered him any services. It was obviously necessary, therefore, to explain the gift in some other way, and as there was no reason why Nathu should have permanently given away part of his land to an ordinary friend, it is now urged that he did so merely for a temporary purpose, and seemingly out of pure good nature and kindness of heart.

But during the trial of the suit the alienee's witnesses insisted that the gift was made as a grateful return for valuable services and that it had no connection whatever with Chiragh Din's application to be appointed lambardar (see evidence of Miran Bakhsh, Mehr Bakhsh, Chaudhri Mahanda, Mian Khuda Bakhsh, Haji Ahmad Bakhsh, and Khair Din). Indeed some of these witnesses went so far as to assert that even before the gift was made, Nathu had been speaking most gratefully of Chiragh Din's invaluable services and had openly expressed his intention of rewarding him handsomely (see evidence of Mian Khuda Bakhsh and Haji Ahmad Bakhsh).

Mr. Fazl-i-Hussain tries to explain all this by urging that at the time when the suit was pending in the Court of the Subordinate Judge, it would have been impolitic for Chiragh Din to state the real facts as his claim to the lambardari was still under consideration and no decision had been given thereon by the Revenue authorities. This is not quite accurate. The claim of Chiragh Din had been finally rejected by the Commissioner on the 4th November 1911 and defendants' witnesses were examined in April and May 1912. Moreover, not a word was said to the Divisional Judge as to this being the real reason for the gift, and by the time that the appeal was heard by that learned Judge it must have been evident to

Chiragh Din that he had no possible chance of obtaining the post for which he was a candidate.

It is true that both in the Court of the Subordinate Judge and in that of the Divisional Judge reference was made to this land being acquired by Chiragh Din in order to qualify himself as a candidate for the post, but it is clear from the judgments of the learned Judges that it was plaintiff who gave this as an explanation for the acquisition of land by Chiragh Din. It is only in this Court and for the reason given above that Chiragh Din has changed his ground and now asserts that the transfer was merely temporary.

As a matter of fact Chiragh Din has made use of the alienation in his favour not only to qualify for the lambardari but also to acquire other land in the village, and he has by means of his ownership of this plot of land succeeded in defeating at least one suit for pre-emption. In these circumstances we cannot listen to this entirely new case which is set up by him and we must keep him to the pleas urged by him in the lower Courts. We must take it, therefore, that his defence is that the land was given to him, and given to him (as the deed states) permanently.

The next question that arises is whether we can believe this story? Two Courts have disbelieved it and have found that there was no conceivable reason why Nathu, who has six sons of his own and is on good terms with them, should go out of his way to make a gift of this kind to one who is not related to him and to whom he is in no way proved to be beholden. It is not as if Nathu was a man of unbounded wealth, for here again the Subordinate Judge and Divisional Judge are agreed that he is far indeed from being a man of means. Such being the facts, and keeping in mind the very significant reference in the deed to the value of the property (*viz.* Rs. 1,000), we think the Courts were fully justified in accepting, as a guiding precedent, the decision of the Division Bench in the case reported as No. 117 *P. R.* 1890 (1) and in holding upon that authority and upon the facts which are very similar to those in the reported case, that the deed was one really of sale though disguised as a gift.

We accordingly dismiss the appeal with costs. The money (Rs. 1,000) must be paid into the Court of the Subordinate Judge within one month from to day.

Appeal dismissed.

(1) 117 *P. R.* 1890 (*F. B.*) (*Tara Chand v. Baldeo*).

No. 71.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
LeRossignol.

MUSSAMMAT RUKMAN AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

SAIN DAS—(PLAINTIFF)—BADRI NATH—(DEFENDANT)—
RESPONDENTS.

Civil Appeal No. 1127 of 1912.

*Custom—succession—ancestral and self-acquired immoveable property—
Kapur Khatri, tahsil Hafizabad, district Gujranwala—daughter or brother—
Wajib-ul-arz—Riwaj-i-am—Hindu Law.*

Held, that it had been proved that the Kapur Khatri of the Hafizabad
Tahsil concerned in this suit are in matters of succession to immoveable
property governed by custom and not by Hindu Law, and also that by that
custom a daughter has no right to succeed as an heir to either the ancestral or
the acquired immoveable property of her deceased father.

*First appeal from the decree of Mian Abdul Hamid, Additional
District Judge, Gujranwala, dated the 20th April 1912.*

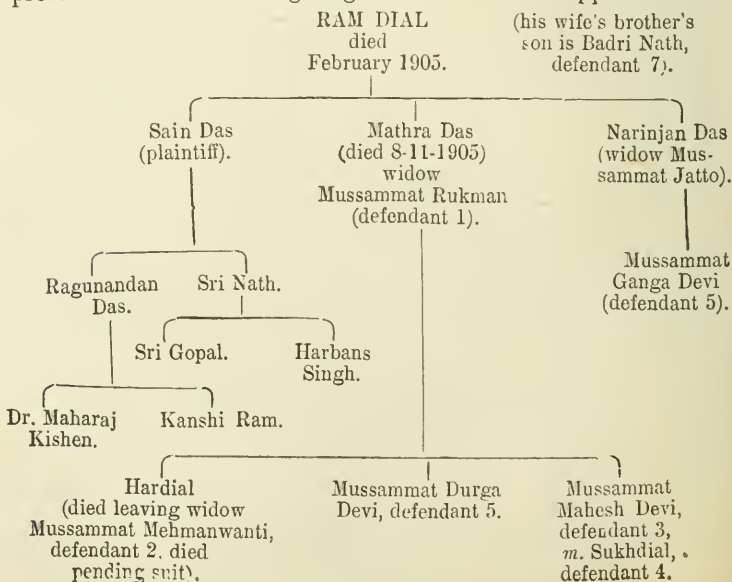
Fazl-i-Hussain and Abdul Ghani, for Appellants.

Muhammad Shafi and Tek Chand, for Respondents.

The judgment of the Court was delivered by—

3rd Feb. 1916.

RATTIGAN, J.—The landed property in suit belongs to an
influential Kapur Khatri family which owns a large amount of
property in various villages in the Hafizabad *Tahsil* of the
Gujranwala District. The family tree is given in detail in
the judgment of the Additional District Judge, but as it does not
include the names of the various ladies who are interested in the
present suit the following might be added as a supplement:—



It is alleged that part of the property claimed was acquired by Mathra Das deceased, but there can be little doubt that by far the more valuable part of it has come down through Ram Dial, the father of the plaintiff, Sain Das, and the deceased Mathra Das. This Ram Dial died at an advanced age in February 1905. It was alleged that he made a will during his life time and on his death a dispute arose between his two sons, Sain Das and Mathra Das. While the matter of the succession to Ram Dial's landed property was before the revenue authorities for consideration in connection with the alteration of the entries in the revenue records, the dispute was referred to arbitrators and an award appears to have been given about June 1905. The dispute however, was not settled and mutation had not taken place when Mathra Das, who was an old man, fell ill in September 1905. He was taken by his son-in-law, Sukh Dial defendant 4, to Gujrat where he appears to have consulted, and to have been treated by, a local medical man but seemingly without much beneficial result. He was brought back to his house in Hafizabad and on the 20th October is alleged to have made a will, Exhibit D-1 in favour of Mussammat Rukman and defendants 2, 3, 5 and 6. He died on the 8th November 1905 and upon his death the defendants claimed to have mutation of names effected in their favour in respect of all the deceased's property, reliance being placed upon the said will. The revenue authorities naturally declined to express any opinion with regard to the genuineness or validity of the will, though in respect of lands in two villages (namely *mauza* Chatai and *mauza* Karyala) they granted mutation in accordance with the terms thereof. As regards the lands in other villages mutation was sanctioned in favour of Mussammat Rukman and Mussammat Mehmanwanti, the two widows, who were alleged to be in possession.

The present suit was instituted by Lala Sain Das on the 4th January 1907. The plaint recites that Mathra Das died on the 8th November 1905, leaving moveable and immoveable property of the value of Rs. 64,916-13-0 in *tahsil* Hafizabad, and claims that the whole of the said property, as specified in the lists attached, was the deceased's ancestral property. It is admitted in the plaint that Mussammat Rukman Devi, defendant No. 1, as widow of the deceased, is entitled to retain possession of the property for her life-time, but the plaintiff claims that on her death he will be entitled by custom to succeed as reversionary heir. The plaint also refers to the fact that a will is alleged to have been executed by Mathra Das, but states that the plaintiff does not admit either its genuineness or

its validity or that the deceased had a disposing mind at the time when he is alleged to have made the will. Plaintiff prayed therefore for a declaratory decree to the effect that he is entitled to succeed as reversionary heir on the death of defendant 1 to the entire property left by Mathra Das and that the alleged will set up by defendants is not genuine or valid or in any way effectual as against his rights.

Defendants filed written statements to the effect that the property left by Mathra Das was not admitted to be ancestral that the parties being high caste Khattris and residents of Hafizabad are bound in matters of succession by the Hindu Law and not by custom; that in the presence of daughters and daughters' sons, plaintiff as the brother of the deceased had no right to sue for possession and was not the heir to the property; and that the deceased had made a will in favour of defendants and that the said will was valid in every respect. Defendant Sukh Dial further pleaded as regards his own rights that in 1898 Ram Dial and Mathra Das had given him one-half of a certain *haveli* and also the land attached to the well known as Ram Dialwala in Kila Ram Kaur and that to this property the plaintiff had no right whatsoever, especially as he had acquiesced in the gift. The Court framed the following issues:—

1. Is the property in suit ancestral?
2. Are the parties governed by custom?
3. In case they are governed by Hindu Law, can the present suit for a declaration be brought by the plaintiff?
4. Cannot the late Mathra Das' daughters and their children have priority over the plaintiff so far as the question of succession is concerned?
5. Did the late Mathra Das execute a will validly, and if so, was he authorized to do so by law?
6. Was Sukh Dial given a portion of the property by Mathra Das or Ram Dial, and did the plaintiff in any way acquiesce in that gift? How far does that acquiescence affect the present case?
7. Cannot the widows of Mathra Das and Hardial Singh claim any portion of the property as *stridhan*?
8. Did the late Mathra Das make any *sankalp*, and if so, cannot his widow dedicate a portion of his property to cover that *sankalp*?
9. What property has been left by the deceased Mathra Das?
10. Has Badri Nath, defendant, given up his rights under the late Mathra Das' will?

After a protracted trial, the suit was eventually decided on the 20th April 1912 when the Additional District Judge granted plaintiff a declaratory decree to the effect that he was entitled to succeed after the death of defendant No. 1 to the whole of the property left by Mathara Das (with the exception of ornaments and wearing apparel) and that the will set up by the defendant was not to affect plaintiffs' right. The learned Judge's findings on the various issues were as follows :—

1. That the parties were in matters of succession to immoveable property governed by custom and not by Hindu Law ;

2. That the will propounded by defendants was not executed by Mathra Das ;

3. That plaintiff was competent to institute the present suit and that the daughters of Mathra Das had no right of succession in the presence of a near collateral such as plaintiff ;

4. That it was unnecessary to determine whether the property was ancestral or self-acquired inasmuch as the daughters had no right to succeed to either ancestral or self-acquired property ;

5. That Mathra Das made a gift of ancestral residential houses in favour of Sukh Dial, but that plaintiff did not acquiesce in the gift which was in no way binding upon him ;

6. That there was no evidence to prove that Mathra Das had made any *sankalp* during his life-time, and that accordingly his widow had no right to set apart any property for that purpose ;

7. That it was unnecessary in the present suit to decide issue No. 9 ; and

8. That inasmuch as the will of Mathra Das had not been proved it was unnecessary to give any decision with regard to issue No. 10.

Defendants have appealed to this Court and the case has been argued at great length and very elaborately by Mr. Fazl-i-Hussain for the appellants, and by Mr. Muhammad Shafi for the respondents. Mr. Fazl-i-Hussain contends :—

1. That the parties are governed in matters of succession by the principles of Hindu Law and not by the Customary Laws which obtain among agriculturists, and that accordingly the daughters of Mathra Das, who was separate from his brother Sain Das, are entitled to succeed to the whole of the deceased's property ;

2. That the will propounded by defendants was actually executed by Mathra Das who was fully competent to transfer his property as he pleased whether by gift *inter vivos* or by will; that Mathra Das was in his senses and had a disposing mind at the time when he executed the will; and that the will is valid by law;

3. That if Hindu Law does not apply and if the will is held not to have been established, even then the daughters would under the ordinary rule of customary law exclude plaintiff from succession to such part of the property as was self-acquired; that in the absence of evidence to shew that the property is ancestral, it must be deemed to have been acquired by the deceased;

4. That the gift of the *haveli* in favour of Sukh Dial had been duly proved and that the gift was in every respect valid and binding on the plaintiff; and

5. That the decision of the Additional District Judge with regard to the alleged *sankalp* was erroneous.

The first and perhaps the most important question to be decided on this appeal is whether the Kapur Khattris of the Hafizabad *tahsil* are governed in matters of succession to immoveable property by the ordinary principles of the *mitakshara* law or by the customary rules obtaining among agricultural tribes of this Province. This question has been carefully and exhaustively considered by the Additional District Judge and the conclusion at which he arrived is that succession in such cases is regulated by custom. The learned Judge has given detailed reasons for his finding and after hearing Mr. Fazl-i-Hussain's criticisms, we are satisfied that this finding is correct and in accordance with the evidence on the record.

Kapur Khattris are not members of any of the well-known dominant agricultural tribes of the Province, and Mr. Shafi for the respondents readily conceded that the *onus probandi* was upon plaintiff to shew that the branch of Kapur Khattris, with whom we are now concerned, do not follow Hindu Law in matters connected with succession to immoveable property. He contended, however, and in our opinion, successfully, that plaintiff had been able to discharge this burden and had proved that in such matters the family of Ram Dial had for generations past been intimately connected with zamindari work; that they had been for two or three centuries owners of large village estates situate in the immediate neighbourhood of villages owned by such agricultural tribes as Bhatti Rajputs, Jats and Arains; that their main source of income was derived from the posses-

sion of such estates; that the head of the family for the time being was the leading agricultural headman (zaildar and lambardar) in the *tahsil*, and had as such actually signed the *Wajib-ul-arzs* of his villages, (pages 114 and 116 of paper-book 'A', which bear the signature of Ram Dial); that the *Rivaj-i-am* of the District prepared at the settlement of 1868 was signed by the said Ram Dial and that the recent *Rivaj-i-am* of 1894-1895 was signed by Mathra Das, the person whose property is now in dispute (see pages 134 and 200 of paper-book 'A'); and that so far as concrete instances could be adduced, plaintiff had been able to give evidence of numerous instances (some, *e g.*, those relating to the property left by Ram Rakha Mal and Narinjan Das, in this very family) of daughters being excluded from inheritance by collaterals of their father, (see Exhibits P. 37, 38, 39, 40, 41, 104, 105, 106, 107, 110), whereas defendants had not been able to point to a single instance of a daughter's succession, apart from a gift made to her by her father in his life-time. As already remarked, the Additional District Judge has dealt very fully with this question and it is unnecessary for us to travel over the ground once more.

No doubt, as Mr. Fazl-i Hussain argues, in most of the cases adduced as evidence to prove the daughters' exclusion, the value of the property involved was not great, but the fact remains that while plaintiff has been able to adduce instances in support of his contention, defendants have entirely failed to point to a single well authenticated case where a daughter has succeeded, *as an heir*, to her father's immoveable property, ancestral or self-acquired.

The fact that these Kapur Khatri are exogamous would doubtless account to some extent for this exclusion, but the main grounds upon which the rule of succession observed by them was based were the prevalent desire in times past to keep the village compact and the conception that the best protectors of the land, at a time when might was often stronger than right, were the male members of the family.

The bald statements of witnesses that Kapur Khatri observe, and are regulated by, Hindu Law are obviously of no value, and it is in this respect that a marked distinction exists between the evidence of witnesses called by the plaintiff and of those called by the defence. The former are able to refer to numerous cases of exclusion of daughters; the latter are not, and merely state dogmatically that Kapur Khatri are high caste Hindus and observe the rules of *Dharm Shashtra*. Some of them admit they are partly Sikhs and partly Hindus

(e. g., Amar Nath, D. W. 6), and others are obliged in cross-examination to say that they do not know the difference between the rules of Hindu Law and of custom (see Hira Nand, D. W. 22, Guran Ditta, D. W. 31). Hari Kishen, D. W. 19 says that Jat customs are quite different from the rules regulating succession amongst Kapur Khattris, but admits that he does not know what Jat customs are, and Sri Nawas (D. W. 16) who is one of the priests of the family, deposes that Kapur Khattris are Guruke Sikhs, and that the customs observed by them are identical with the customs of the Jats. Finally, three of defendants' own witnesses (Amar Chand, D. W. 25, Nihal Chand, D. W. 27 and Devi Ditta Mal, D. W. 28) have admitted that among Kapur Khattris a daughter does not succeed *as an heir* to her father's immoveable property. Having regard then to the circumstances above referred to and especially to the very ancient connection of the family with village lands, we agree with the Court below that so far as regards succession to immoveable property, the family of the parties is bound by the rules not of Hindu Law, but of custom as embodied in the *Wajib-ul-arzs* and *Riwaj-i-ams* of 1856, 1868, 1892 and of the last settlement (see Customary Law of Gujranwala District by Mr. Lall, pages 16 and 30).

Under the ordinary rules of customary law in this Province, a daughter would have no right to succeed to her father's ancestral immoveable property in the presence of her paternal uncle, and defendants have completely failed to prove a special custom in this family which would give her such preference.

On the other hand, plaintiff has been able to point to numerous instances in support of the statements in the *Wajib-ul-arzs* and *Riwaj-i-ams* above mentioned. Mr. Fazl-i-Hussain contends, however, that even if such be the rule with regard to ancestral immoveable property, the *presumption* is that a daughter has a preferential right to succeed to her father's acquired immoveable property and that as there is no proof that any part of the landed or house property left by Mathra Das is ancestral property *qua* plaintiff, the daughters of Mathra Das should be held to be entitled to the whole of his estate.

There is considerable authority for the general proposition as stated by Mr. Fazl-i-Hussain, and here again Mr. Shafi admits that the *onus* was originally on plaintiff. He argues however, that the *onus* has been shifted by the evidence which his client has adduced. The *Wajib-ul-arzs* and *Riwaj-i-ams* do not limit the collaterals' preferential rights merely to ancestral property.

The *Riwaj-i-am* of 1894-1895 especially makes it clear that the distinction between ancestral and acquired property was not lost sight of (see questions 43 (2) and 47, pages 225 and 227 of paper-book 'A'), and the answer to question 47 is clear and emphatic that "the daughter has in no case a right to succeed to the property," (*cf.*, also the answers to questions 49 and 50). Furthermore, Narinjan Das (brother of plaintiff and Mathra Das) left both acquired and ancestral property and though a daughter, Mussammat Ganga Devi, survived him, the whole of his property went to his brothers, (see Nanak Chand, P. W. 18; Jawahar Mal, P. W. 21; Raghpat Rai, P. W. 22 (page 419, line 20, page 420, line 30); Gayan Chand, P. W. 32 (page 429, line 7). So also in the matter of succession to Ram Rakha Mal (another member of the family), his daughters were excluded from the inheritance, though he left both acquired and ancestral property, (see Pt. Harnam Das, P. W. 8 (page 407, line 20) the first of the family; Raghpat Rai, P. W. 22, (page 419, line 18; Gayan Chand, page 429, line 7). The like happened on the death of Guru Das, Kapur (see Mohan Lal, P. W. 62 (page 481, lines 4—7).

We hold, therefore, that plaintiff has succeeded in proving that in this family a daughter has no right to succeed *as an heir*, to either the ancestral or the acquired immoveable property of her deceased father. It was probably for this very reason that defendants realized the necessity of having a will to support their claims to Mathra Das' property. This brings us to a consideration of the will which they have propounded.

The Additional District Judge has found against the genuineness of the will and the reasons given by him in support of his finding are certainly very strong. He points out that the document was written out by the defendant Badri Nath who is himself one of the legatees thereunder; that there is considerable and material discrepancy between the statements of the three attesting witnesses who gave evidence in Court, as to what occurred at the time of execution; that it was not possible for an enfeebled and paralysed man, over 70 years of age, and on his death-bed, to dictate an elaborate and detailed will of this kind which, moreover, contains not a single alteration or correction, (see the will as translated at pages 383 and 384 of paper-book 'A'); and that in view of the value of the property involved and of the facts that owing to paralysis the testator was unable to sign the document and was compelled (apparently for the first time in his life) to affix his thumb-mark instead, and that registration could have been effected

without any trouble or inconvenience at any time between the alleged date of execution (the 20th October) and the date of the testator's death, the omission to take so obvious and natural a precaution was very significant. We might add that this omission is the more remarkable when we find that the Sub-Registrar, Lala Harsukh Rai (P. W. 38) actually saw Mathra Das no less than four times after he had been brought back from Gujrat (*i. e.*, to say about the end of September) and before his death on the 8th November. It is also an unfortunate fact that the three attesting witnesses who have given evidence in Court, Amar Chand, D. W. 25, Diwan Chand, D. W. 26 and Nihal Chand D. W. 27, are, for various reasons, by no means favourably disposed towards plaintiff and his son Sri Nath.

Mr. Fazl-i Hussain made no attempt to explain the omission to register so important a will. All that he could urge was that it was not compulsorily registrable. That, no doubt, is quite true, but it was nevertheless a common practice in this country to register wills and it is surely surprising to find intelligent men of business such as Mathra Das and Sukh Dial omitting to take a precaution of the kind especially at a time when the relations between Sain Das, plaintiff, and Mathra Das were very strained and the disputed succession to Ram Dial's property had not been settled.

In this connection we might point out that the witness Daulat Ram (P. W. 41) who appears to be an impartial witness, has deposed that he was asked, some twenty days prior to Mathra Das' death, to attest a will alleged to have been executed by the latter, but that he refused to attest it as he knew that Mathra Das was not then in his proper senses. It was probably this man who raised the suspicions of Sain Das, as we find the latter, on the 4th November presenting a petition (see page 292 of paper book 'A') to the Collector praying that officer to take action, as he (Sain Das) had reason to believe that certain persons were "securing" a document from Mathra Das who was not in his proper senses. The petitioner's application states that Mathra Das has been seriously ill for the last two months and is quite incapable of any intelligent act, and he begs the Collector, while Mathra Das is still alive, to satisfy himself upon this point. Unfortunately no action was taken on this petition until after Mathra Das' death when it was in due course rejected.

In these circumstances we agree with the learned Additional District Judge that the will set up by defendants is open to the very gravest suspicion and that its genuineness cannot be regarded as established.

But even if we could hold that it was in fact executed by Mathra Das, we should still have to find that at the time when it was executed, the testator had not "a disposing mind." Admittedly he had been seriously ill since the beginning of September and had been taken for medical treatment to Gujrat where Ganesh Das, a connection of his by marriage, resides. He remained there under treatment till about the end of September when he was taken back to his own house in Hafizabad, and from the admitted fact that he was then still ill, we may reasonably infer that the object of taking him back was to enable him to die (as it was feared he must very shortly) in his own house. He was certainly very ill indeed when he was brought back, and on the 20th October when the will is said to have been executed, he was so paralysed that (according to the will itself) he was unable to append his signature. In addition to these admitted facts, we have a mass of evidence to the effect that he was utterly incompetent to make a will after his return to Hafizabad, (see the statements of Lala Harsukh Rai, P. W. 38 ; Bhola Nath contractor, P. W. 39 ; Dr. Amrit Singh, P. W. 40, Daulat Ram, Hospital Assistant, P. W. 41 ; Nanak Chand, retired Hospital Assistant, P. W. 42 ; Gopal Das, P. W. 45 ; Badri Nath, P. W. 46 ; Devi Dial, P. W. 48 and Hari Chand, P. W. 49). On the other hand, Sukh Dial, defendant (who is conducting the case on behalf of himself and his co-defendant) deposed that Mathra Das, after his return from Gujrat, was professionally treated by Lal Muhammad, Hospital Assistant (one of the attesting witnesses) and a Dr. Kaul Das (see page 394, lines 20 and 43). Lal Muhammad died while the suit was pending in the lower Court, but defendants did not call Dr. Kaul Das nor have they explained why he was not called as a witness.

Upon the evidence before us we must hold that Mathra Das was not mentally competent to dispose of his property at the time when he is said to have made the will upon which defendants rely. The will, therefore, fails.

As regards defendant Sukh Dial's claim to the *haveli* (issue No. 6), we need say no more than that it is admittedly based on the *ruqqa* (Exhibit D. 2). This document is open to grave suspicion in many respects and has clearly been tampered with in respect of the date which it purports to bear, but it is unnecessary to discuss it further as Mr. Fazl-i-Hussain had to admit that it had not been proved. Sukh Dial in his evidence makes no reference to it nor was any witness called to prove it.

The only other point to which reference was made at the hearing before us was as regards the right of the widow, Mussammat Rukman, to make certain gifts by way of charity (*sankalp*). This is a very minor question, but as the donees are not parties to this suit, we obviously can give no decision as to the validity or otherwise of the gift that would be binding on them.

Plaintiff preferred cross-objections from the decree of the Additional District Judge in respect of the dismissal of the claim to certain ornaments and moveables in the possession of defendants, but Mr. Shafi on behalf of his client withdrew them at the hearing.

The result is that the appeal and cross-objections stand dismissed. The parties will bear their own costs in this Court.

Appeal dismissed.

No. 72.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge and
Hon. Mr. Justice Rattigan.*

RAMJI DAS AND OTHERS—(PLAINTIFFS)—APPELLANTS,
Versus

MUSSAMMAT THAKAR DEVI AND OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 2332 of 1913.

Punjab Courts Act, III of 1914, section 41, clause (c)—second appeal—substantial error or defect in procedure.

Held, that mere alleged error in weighing evidence is no ground for second appeal within the meaning of clause (c) of section 41 of the Punjab Courts Act.

Second appeal from the decree of Major J. Frizelle, Divisional Judge of Sialkot, dated the 18th of August 1913.

Mul Raj, for Appellants.

Asquith, for Respondents.

The judgment of the Court was delivered by—

4th Feb. 1916.

SIR DONALD JOHNSTONE, C. J.—The parties belong to the Acharaj caste and live in Pasrur, District Sialkot. The suit is by the two nephews of one Billu deceased for cancellation of the adoption of Manohar Lal defendant 2 by a deed of adoption executed on 16th February 1912 by Mussammat Thakar Devi defendant 1, widow of the said Billu, who had died nine months earlier. The learned District Judge held

that the adoption by the widow was under Hindu Law invalid, inasmuch as it was not proved that the widow really had been given authority to adopt by her late husband. On appeal the learned Divisional Judge found that the express giving of authority by Billu on his death-bed was proved, and that Manohar Lal, being in no way barred by law from being adopted, the adoption by the widow was clearly valid.

The suit having thus been dismissed, plaintiffs have come up here on second appeal and we have heard arguments. It is admitted before us that clauses (a) and (b) of section 41 of the Courts Act do not help plaintiffs to a second appeal in this case, as the question in dispute is not one of law or custom but merely of fact, *i.e.*, whether Billu, before he died, gave his widow authority to adopt or not. But plaintiffs invoke clause (c), urging that the lower Appellate Court has ignored valuable evidence. In connection with this we lay it down that mere alleged error in *weighing* evidence is no ground for second appeal.

Relying on clause (c) the learned pleader contends :—

(i) That the oral evidence as to Billu's being unconscious before death and so unable to give authority to adopt was ignored.

This contention does not much impress us. There were 3 witnesses on this point. The first says Billu was dying of plague and no one would go near him, and that witness stood outside and called to him but got no answer. The second said he asked defendant 1 about her husband and she said he was *be-hosh*: this witness, though he stoutly asserts that Billu gave no authority to adopt, actually attested the adoption deed! The third witness says he called out consoling remarks to the patient from a distance and that no authority to adopt was given. It is not surprising if the lower Appellate Court thought such testimony hardly worth noticing.

(ii) That Manohar Lal did not do *kirya karm* has been overlooked. This is sufficiently answered by the remark that Manohar Lal was not at that time *adopted* and so could not perform those ceremonies. Lower Appellate Court has noticed the matter.

(iii) That the long delay in adoption has been overlooked. A feast had to be given and arrangements had to be made. We do not think this a vital matter.

(iv) That the lower Appellate Court never noticed that in the deed the widow keeps the estate for herself for life,

whereas in case of a real adoption the adoptee would at once become full owner. But there is a real adoption, though the widow, ignorant of the law, has attempted by an addition to the deed to secure herself for life. Probably this addition is really inoperative. It is said Manohar Lal has sued for partition of the estate in his own name.

We can see no sufficient reason for interference. Dismissed with costs.

Appeal dismissed.

No. 73.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

ABUL FATTEH—(PLAINTIFF)—APPELLANT,

Versus

FATTEH ALI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No 2477 of 1915.

Pre-emption—joint decree in favour of rival pre-emptors—one to succeed after the other, if latter failed to pay decretal amount into Court on a certain date—whether payment to vendee out of Court by that date, but not certified till later, is sufficient compliance with decree.

Two rival pre-emptors F. A. and A. F. secured a joint decree for pre-emption, the rights of F. A. being preferred to those of A. F. Under the decree F. A. had to pay the price into Court by the 15th March 1915 and in default his claim was to stand dismissed and then A. F.'s claim was to come in. On 5th March F. A. put in a receipt for the price and asked that payment be certified. The Court then issued notice to the judgment-debtors to appear and fixed 25th March for hearing. On 25th March, as notices had not been served, the 12th April was fixed. On 31st March a number of judgment-debtors appeared and confirmed the receipt and on the 12th April some more appeared and also confirmed the receipt.

Held, that as the payment to the judgment-debtors by F. A. had not been certified in Court by the 15th March 1915 it could not be considered equivalent to payment into Court by that date and that consequently F. A.'s claim stood dismissed on the 16th March and the decree in favour of A. F. came into force.

21 P. R. 1889 (1), distinguished and explained.

Miscellaneous second appeal from the decree of A. E. Martineau, Esquire, District Judge, Gurdaspur, dated the 24th June 1915.

Oertel and Muhammad Hussain, for Appellant.

Bhagwan Das and Duni Chand, for Respondents.

The judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—In this case two rival pre-emptors, Fattah Ali and Abul Fattah, secured a joint decree for

7th Feb. 1916.

(1) 21 P. R. 1889 (*Sher Shah v. Sher Jang*).

pre-emption, the rights of Fattah Ali being preferred to those of Abul Fattah. It was laid down in the decree that on or before the 15th March 1915 a sum of money fixed as the price to be paid should be paid by him into Court and in default his claim should stand dismissed, and that, if he does commit default, then Abul Fattah's claim is to come in and *he* would have a period within which he must pay in the money and take possession.

On the 5th March Fattah Ali put in a receipt for the whole sum and asked that payment should be certified. The Court thereupon issued notice to the judgment-debtors to appear and declare whether they had received the money or not. The date for hearing was fixed for 25th March 1915; but in consequence of notice not having been served fresh notices were issued for the 12th April. On the 31st March eleven of the judgment-debtors appeared and confirmed the receipt, and intimated that two judgment-debtors were dead, and vouched for them. On the 12th April four more judgment-debtors appeared and confirmed the receipt of the money, whereupon the Court gave an order for possession of the land, but immediately cancelled it, and then on the 28th April passed a lengthy order holding that Fattah Ali had not complied with the decree and that therefore Abul Fattah was entitled to execute *his* decree. In the meantime on the 16th March Abul Fattah had applied for execution, and the order of 28th April decided both applications.

The lower Appellate Court took a different view of the law holding that 21 *P. R.* 1889 (1) was fully in point and that the presentation of the receipt aforesaid on the 5th of March 1915 was equivalent to payment into Court. It, therefore, accepted the appeal, declared that Fattah Ali had fulfilled the conditions of the decree, and, inasmuch as Abul Fattah had contested the matter, gave costs against Abul Fattah, who has now come up to this Court with a second appeal.

In my opinion, though I do not agree entirely with the reasons given, the decision of the First Court was correct. It seems to me impossible to hold that Fattah Ali complied with the terms of the decree. The ruling 21 *P. R.* 1889 (1) is distinguishable in several particulars. In connection with this matter there is no perceptible difference between the Statute Law on the subject in force in 1889 and at the present time, though the phraseology has been altered a good deal. (*Cf.*

(1) 21 *P. R.* 1889 (*Sher Shah v. Sher Jang*).

section 214 of the Civil Procedure Code, 1877 and 1889 and order 20, rule 14 of the present Code). In the original Act, IV of 1872, there was nothing about payment into Court at all. Section 18 said the decree shall specify the date on or before which this money shall be paid, but it did not say where it shall be paid. This section, however, was repealed by Act VII of 1895, and the rules in the Civil Procedure Code took its place.

The distinction between the present case and that dealt with in the ruling of 1889 is twofold.

Firstly, in the earlier case the dispute was between a pre-emptor and a vendee and not between rival pre-emptors. It might well be considered extremely pedantic where none but the pre-emptor and the vendee were concerned, to hold that money had not been paid into Court when both the pre-emptor and the vendee had certified in Court that it had been paid. Here, however, the dispute is between rival pre-emptors, and it seems to me that Abul Fattah is entitled to a very strict compliance by Fattah Ali with the terms of the decree.

Secondly, in the case of 1889 everything necessary was done *before due date*, i. e. part of the money was paid in cash into Court and as to the rest the decree-holder put before the Court the receipt of the payee of that part, while the payee then *and there* admitted in Court that he had received the money. This obviously put the Court at once into the position of being able to issue a warrant for possession in favour of the decree-holder.

The history of the present case shows how different is the state of affairs here. I have already given that history, and from it it appears that it was not until the 12th April 1915 at the soonest that the Court was satisfied that the money had really been paid. This, of course, was long after the due date, and I do not think that the interpretation put by the Judges in 1889 upon the words "payment into Court" can properly be made to cover a state of affairs like those in the present case. My own feeling has always been that the ruling of 1889 went too far in the way of relaxing the law, but at present I am quite willing to accept that ruling. It, however appears to me to go no further than this that action on the part of the pre-emptor and the vendee *completed before the due date and calculated to put the Court into a position to issue an immediate warrant for possession* may be taken as equivalent to payment into Court. In the present case Fattah Ali did not take such action as this. On due date it was still uncertain

whether he was entitled to execution and therefore I have no hesitation in saying that Fattah Ali's decree became a piece of waste paper on the 16th March 1915.

Therefore I must accept this appeal, set aside the judgment of the Lower Appellate Court and restore the judgment of the Senior Subordinate Judge. Fattah Ali will pay Abul Fattah's costs in all the three Courts.

Appeal accepted.

No. 74.

*Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
Scott-Smith.*

BHAGWAN DAS—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT BALWANTI—(DEFENDANT)—RESPONDENT.

Civil Appeal No 1310 of 1911.

*Custom—succession—self-acquired property—daughter or collaterals—
Jains of Buria, tahsil Jagadhri, district Ambala—onus probandi.*

Held, that the plaintiff, a collateral in the sixth degree, on whom the onus lay, had failed to prove a custom among Jains of Buria by which he would succeed to self-acquired property in preference to a daughter.

*First appeal from the decree of C. F. Osborne, Esquire, District
Judge, Ambala, dated the 10th July 1911.*

Sham Lal, Shuja-ud-Din and Dalip Singh, for Appellant.

Beechey and G. C. Narang, for Respondent.

The judgment of the Court was delivered by—

CHEVIS, J.—The plaintiff, a collateral in the sixth degree, *7th Feb. 1916.* claims possession of all the property, moveable and immoveable, of the late Mittar Sain, a Jain of Buria, Jagadhri *tahsil*, Ambala district. The defendant is the daughter of Mittar Sain. The suit having been dismissed by the District Judge the plaintiff appeals.

A preliminary objection that the appeal is time barred was overruled. The decree of the first Court is dated 10th July 1911. Copy was applied for the same day, and supplied on 28th July 1911. Application for leave to appeal in *forma pauperis*, accompanied by grounds of appeal, was presented to this Court on 16th October 1911, the first working day after the Chief Court vacation, and was rejected on 30th October 1911. Full stamp was put in on 27th November 1911. Allowing that this was not within time we think there is sufficient reason for allowing an extension.

The parties being Saraogi Jains, and it not being shown that they depend mainly on agriculture, there is no initial presumption that they are not governed by Hindu law. But plaintiff pleads in his plaint that by custom of the tribe and the family he is entitled to succeed to the exclusion of the daughter. It is for him to prove such a custom. In the first place it may be remarked that the learned District Judge has referred to certain cases decided between Jains in the United Provinces. Counsel for the plaintiff objects to such cases being referred to, and urges that the custom of Ambala Jains is not necessarily the same as that of Jains in other parts of India. Admitting this contention to have force we asked counsel to what limits he wished to confine the enquiry, and he replied that he wished to confine it within the Ambala district. We will therefore confine ourselves to the limits of the Ambala district in disposing of this appeal.

* * * * *

We may here remark that the custom propounded, *viz.*, a custom by which a collateral excludes a daughter, even as regards self-acquired property of her father, goes beyond the ordinary agricultural custom of the Punjab. Counsel owns that there is no proof as to the land in suit being ancestral *qua* the plaintiff. As to the houses he points to the *kharsa abadi* papers of the settlement of 1849, which are printed in Book C., but he omits entirely to shew us which of these houses correspond to the houses now in suit. Unless the houses can be traced and identified with the houses now in suit the *kharsa abadi* is of no use in the present suit.

Next we note that the plaintiff has not produced the *Riwaj-i-am* or *Wajib-ul-arz*. Nor are there any judicial cases relating to Jains of the Ambala district, in which a collateral has excluded a daughter.

The case for the plaintiff rests entirely on oral evidence. As the District Judge remarks cases where a member of a joint Hindu family has died and his daughter has not succeeded are not in point, as in such a case the other male members of the family succeed by survivorship.

The District Judge has dealt with the instances cited by the witnesses but has omitted to deal specifically with a few. We will deal with the instances briefly.

(1) Makhan Lal by will left most of his property to his nephews and very little to his daughter's sons. This is a case of will, and proves nothing as to the rule of succession.

(2) The case of Gopi, spoken of by Jehangiri Mal (Book 137) and Kundan Lal (Book 141). The evidence of the two witnesses seems discrepant. Jehangiri Mal says he and his brother took it as cousins of deceased. Kundan Lal, a son-in-law of Gopi, says the property went to Gopi's brothers. Counsel urges that the word *bhai* includes consins. It does sometimes, but not always. And this is not the only discrepancy. Jehangiri Mal says the property was one house worth Rs. 5,000 and cash, etc., Rs. 2,000. Kundan Lal however speaks of land and shops, though he says he does not know in which village the land was. Evidence of this vague kind is of no value.

(3) and (4) Two instances cited by Lekhraj, who is the sole witness with regard to them. As regards the case of Sarni Mal, the brother who succeeded may have been joint. As regards the case of the witness's own brother the witness and his brother were joint. So these cases prove nothing.

(5) and (6) Nathu (B. page 129) is the only witness with regard to these cases. He really cites three cases, those of Gobind, Sawaya Ram and Chhajju. In Gobind's case he and his brothers had a common kitchen, so probably the family was joint, which would explain the brothers' succeeding. The witness's knowledge of Sawaya Ram's case is evidently of the vaguest, as, though he says the collaterals excluded the daughter, in cross examination he says he does not know whether Sawaya Ram had a son or a brother. As to the case of Chhajju, brother of the witness, this too was probably a case of a joint family, as the witness says, "we lived and "messed together; our property has not been divided since "my father's death." Though another witness, Chittar Mal, says Chhajju and Nathu were *not* real brothers.

(7) and (8) Cited by Chittar Mal (B page 132). This witness really names four instances, but we are following the numbering of instances in the District Judge's judgment. The instances cited by the witness are those of Bishan, Nathu, Bahta and Dosaundhi. Witness says Bishan, his great uncle, had a house, which came to witness and his brother. He says Bishan's daughters died after their father. We have only his word for this. If the daughters left no children of course the house will now be with the collaterals. And in cross-examination he says Bishan only had a one-third share in the house, and that he and Bishan fed together, so this too was probably a case of a joint family.

Witness had another great uncle Nathu who left a house, which went to the collaterals.

Bahta left a house and shop, which the collateral took and not the daughter. Such instances as the two last prove nothing much. In many cases the daughter, being married in another village, would care little about a house or shop of little value, and even if she did not waive her rights entirely in favour of an uncle or cousin would probably have no objection to being bought out.

The last case cited by this witness is that of Dasaundhi. Witness says his property went to a widow to the exclusion of a daughter. But in cross examination he says Dasaundhi had no daughter, but a granddaughter, and a collateral got the house. This again is only a case of a house.

(9) and (10) and (11) Cited by Duni Chand, (B. 135). This witness cites four instances, those of Jamna Das, Jiwana, Ajibi and Bakhtawar. Jamna Das had a married daughter, who has died leaving no issue. Witness does not know exactly when Jamna Das died. Possibly the daughter died before him.

Jiwana's case is not in point, as his son succeeded him at his death, and then his grandson succeeded. On the death of the latter the collaterals of course excluded Jiwana's daughter, who was only an aunt of the last male owner.

Ajibi is said to have died a few years ago. His daughter is still unmarried. If a collateral has taken the property she may still sue for it. She is probably yet a minor as she has not yet married. And Ajibi left only a share in a house and shop, so this too is probably a case of a joint family. Bakhtawar was witness's father-in-law. Witness says Bakhtawar left a house which went to a collateral. Whether witness's wife is still alive or whether if dead she has left issue, does not appear. For all that we know she may have died in her father's life-time.

(12) and (13) Instances cited by Uggar Sain (B. page 136). He really cites four cases, those of Mutsaddi, Diwan Singh, Dauli and Partap Singh.

Diwan Singh left some share, witness does not know how much, in a house.

Dauli son of Dasaundhi left one-fourth of a *haveli*.

Partap Singh left a one-fourth share in a *haveli*.

These are all probably cases of joint families. Witness says Dauli son of Dasaundhi left a daughter Gaindi. This is obviously the case, already dealt with, spoken of by Chittar Mal, who never mentioned the fact that Dasaundhi had left a

son. This shews how little the witnesses really know of the cases they cite. Chittar Mal's first version was that Dasaundhi's daughter was excluded.

As to Mutsaddi's case this is not in point. It is not mentioned that he had a daughter.

No 14, cited by Khub Chand. He cites two cases, one of Bansi, the other of Jado. Bansi's case is not in point, as he left a son. On the son's death the collaterals excluded the son's sister. As to Jado's case he left only half of an ancestral house. This is probably a case of a joint family.

Counsel for plaintiff also wished to rely on the instances cited by Babu Lal, but these are Saharanpur cases, and as we reminded counsel he had himself objected at the beginning of his argument to the enquiry being extended beyond the limits of the Ambala district.

It seems to us quite unnecessary to deal with the defendant's evidence. In the absence of proof that the property is ancestral *qua* the plaintiff, the *onus* of proving that he can oust the daughter of the last male owner clearly lies on him, and this *onus* he has entirely failed to discharge. Counsel has referred us to a "round robin," printed on page 31 of paper book C, but this document is not admissible in evidence, the persons who have signed it not having been produced to give evidence on oath and to undergo the test of cross-examination. The oral evidence which has been produced we regard as quite unreliable and insufficient to prove the alleged custom.

We therefore uphold the decision of the District Judge, dismissing the suit and dismiss this appeal. We note that the respondent has incurred an unnecessarily large amount of expense in printing documents which in our opinion need not have been printed, and we direct that the plaintiff-appellant do pay the costs of defendant in this Court excluding costs of printing. Costs in the lower Court to be paid as ordered by that Court.

Appeal dismissed.

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No. 75.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Shah Din.*

ABDUL SAMAD—(PLAINTIFF)—APPELLANT,

Versus

MUNICIPAL COMMITTEE OF DELHI—(DEFENDANT)—
RESPONDENT.

Civil Appeal No. 3024 of 1915.

*Punjab Municipal Act, III of 1911, sections 189 (3), 193 and 195—
suit for injunction restraining the Municipal Committee from interfering with*

the upper storey of plaintiff's house—question whether Committee acted in good faith or mala fide—whether ground for second appeal—sanction to build conditional on erecting wall 2 feet back—propriety of condition.

In a sanction under section 193 of the Punjab Municipal Act the Municipal Committee attached the condition that plaintiff should not build his wall within 2 feet of a certain open space which was originally about 5 feet and 4 inches wide and would thus be increased in width by 2 feet. The plaintiff however built his house in disregard of this condition and thereupon the Committee served a notice on him under section 195 requiring him to demolish the upper storey of the building. The plaintiff then brought the present suit for an injunction restraining the Committee from interfering with the upper storey. The lower Courts found that the condition in question was not *ultra vires* and the action of the Committee was not *mala fide* and dismissed plaintiff's suit. Plaintiff thereon preferred a second appeal to the Chief Court.

Held that the question whether the Committee acted in good faith or *mala fide* in imposing the condition on which alone it granted sanction to plaintiff to build a two storied house was one of fact and could not be considered in second appeal.

Held also, on the merits, that there was nothing illegal, wanton, capricious or oppressive in a condition such as this which was aimed at restraining the building of erections consisting of more than one storey alongside a narrow open space but was on the contrary eminently reasonable and conducive to sanitation, free circulation of air and ventilation within the meaning and for the purposes of section 189 (3) (i) and (iii) of the Punjab Municipal Act.

Second appeal from the decree of O. L. Dandlas, Esquire, District Judge, Delhi, dated the 5th August 1915.

Moti Sagar, for Appellant.

Santanam, for Respondent.

The judgment of the Court was delivered by—

16th Feb, 1916.

RATTIGAN, J.—This is a second appeal from the decree of the District Judge, Delhi, dated 5th August 1915 and the sole question before us is whether the plaintiff was justified in building in contravention of the condition laid down by the Municipal Committee of Delhi in the written sanction which was issued to him on the 24th February 1914 with reference to his application dated 5th January 1914. The Subordinate Judge and the District Judge are agreed that the condition in question was not *ultra vires*, and that the action of the Municipal Committee was not *mala fide*, and on this finding they have dismissed plaintiff's suit in which he prayed for an injunction to restrain the Committee from interfering with the upper storey of the house which has been built.

It is not very easy to see on what ground plaintiff is entitled to prefer this second appeal, as the only question

involved is whether the Committee acted in good faith or *mala fide* in imposing the condition on which alone it granted sanction to plaintiff to build a two-storied house. That question is one of fact and it has already been decided adversely to plaintiff by the Courts below. The point has, however, been argued at length and we decided to deal with it on its merits, but we might in passing remark that ground (4) of the grounds of appeal to this Court has not been pressed before us, obviously for the very sufficient reason that if the conditional sanction granted by the Committee was *intra vires* and could not be shewn to be open to objection on such other grounds as the Courts can take into consideration in cases of this kind, the subsequent order of the Committee under section 195 of the Punjab Municipal Act, 1911, must clearly be held to be valid and lawful.

The question then is whether the condition set forth in the written sanction issued by the Committee to the plaintiff on the 24th February 1914 is open to objection and is such that the Courts can hold to be not binding on plaintiff. It is to the effect that plaintiff's application (to build a two-storied building) is granted but subject to the condition that he must leave vacant seven feet of his land towards the west. Before proceeding we may here point out that on this western side there is, as the boundary of plaintiff's estate, an open space, about 5 feet 4 inches in width, which is (according to the District Judge who inspected the spot) more in the nature of a surface-drain (*Jhet*) than an alley. The written sanction was clearly intended to mean, and has so been understood by the plaintiff (see his plaint), the Committee and the Courts, that plaintiff should not build his wall within 2 feet of this open space, the object being that the said open space should hereafter be at least 7 feet in width.

Now *prima facie* there is nothing illegal, wanton, capricious or oppressive in a condition, such as this, which is aimed at restraining the building of erections consisting of more than one storey alongside a narrow open space. On the contrary it would seem to be eminently reasonable and conducive to sanitation, free circulation of air and ventilation, within the meaning and for the purposes of section 189 (3) (i) and (ii) of the Punjab Municipal Act, read with section 193 thereof. Plaintiff, however, complains that the Committee were not influenced by those reasons, but that by imposing this condition they wanted to deprive him of proprietary rights in his land to the extent

of a strip two feet in width between his house and the said open space, and in support of this contention Mr. Moti Sagar, his learned pleader, relies upon a note made by the Secretary to the Committee, when submitting the plaintiff's application to the General Committee, that before granting sanction plaintiff should be called upon to execute an agreement giving up his proprietary rights in seven feet of his land to the west. The Secretary undoubtedly made this suggestion, but we cannot see how that affects the present question.

What plaintiff had to look to was the written sanction issued to him and in that there is nothing said about his executing any such agreement or surrendering his proprietary rights in the land which was to be left vacant. All he had to do was to comply with the terms of this written sanction and had he done so, we fail to see how the Committee could possibly have thereafter contended that he had surrendered his ownership in the vacant land—which, as we have pointed out, was to the knowledge of all parties, to comprise a strip two feet in width of plaintiff's land.

Mr. Moti Sagar admitted that the Committee were not actuated by any ill-feeling towards his client, but he suggested that their object was to coerce him into giving up his proprietary rights in this strip, so that they could widen the open space already existing and make the whole their own property. We do not feel justified in thus assuming *mala fides* on the part of the Committee, whose action was perfectly consistent with a legitimate desire on their part not to allow high buildings to be erected which would impede the circulation of air and prevent proper sanitation and ventilation in the immediate vicinity of a narrow alley or drain.

We might further add that it is good evidence that they had no such sinister design to acquire land in this illegal and high-handed manner, that even now all that they have called upon plaintiff to do is to demolish not his whole building, but merely the obnoxious upper storey. Plaintiff urges that compliance with this notice will entail heavy loss upon him but with that aspect of the question we have nothing to do. He acted defiantly and with his eyes open and he must bear the consequences.

The appeal is dismissed but we leave the parties to bear their own costs.

Appeal dismissed.

Special Bench.

No. 76.

Before Hon. Mr. Justice Rattigan, Hon. Mr. Justice
Scott-Smith and Hon. Mr. Justice LeRossignol.

MORTON—PETITIONER,

Versus

MORTON—RESPONDENT.

Matrimonial Reference, Case No. 6 of 1915.

*Indian Divorce Act, IV of 1869, section 3 (1), (2), (3), and section 10—
jurisdiction of District Court "where husband and wife reside or last resided
together."*

Held, that having regard to the definition of "High Court," "District
Judge," and "District Court," given in section 3 of the Indian Divorce
Act the District Court of Ambala had no jurisdiction in a case for dis-
solution of marriage where the petitioner and his wife last lived and
cohabited together at Bangalore and where the wife at the time of in-
stitution of the proceedings was apparently living in Calcutta and was
certainly not residing, dwelling or present at any place within the Punjab.

*Case referred by Major B O Roe, District Judge, Ambala,
with his No. 1180-G, dated the 4th August 1915.*

Dalip Singh, for Petitioner.

Nemo., for Respondent.

The order of the Court was delivered by—

RATTIGAN, J.—Mr. Dalip Singh (on behalf of Mr. Bevan- 18th Feb. 1916.
Petman) applies under section 17 of the Indian Divorce Act 1869,
for confirmation of the decree *nisi*, passed on the 24th of
July 1915, by the District Judge of Ambala, for the dissolu-
tion of the marriage of Richard John Morton petitioner, and
Norah Mary Morton, respondent.

It is unnecessary for us to discuss the facts of the case
as it is obvious upon the face of the proceedings that the
District Judge had no jurisdiction to entertain the petition.
It is stated in paragraph 2 of the petition that the petitioner
and his wife last lived and cohabited together at Bangalore,
and it is clear from the record that the respondent does not
reside, and, so far as we can see, has not for many years
resided, within the District of Ambala. She appears to have
been living at the time of the institution of the proceedings
in Calcutta, and was certainly not residing, dwelling or
present at any place within the Punjab.

In the circumstances and having regard to the definitions
of the terms "High Court," "District Judge," and "District
Court" in section 3 of the Act, we must hold that the District
Judge had no jurisdiction to try and determine the case.

As a result we must decline to confirm the decree which is accordingly set aside.

Application rejected.

No. 77

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

KASIM BEG—(PLAINTIFF)—APPELLANT,
Versus

JHANDA AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2263 of 1914.

Custom—Pre-emption—Lahore City—Mohalla Rahmat Ullah Qureshi—value of evidence of existence of the custom in adjacent Mohallas and of previous cases in which vendee surrendered his bargain to the plaintiff-pre-emptor.

Held, that it had been proved that the custom of pre-emption exists in Mohalla Rahmat Ullah Qureshi, a sub-division of Lahore City.

Held also, that cases in which the vendee surrendered his bargain to the plaintiff-pre-emptor on receipt of the full price are not wholly devoid of value as precedents in favour of the existence of the custom of pre-emption.

17 P. R. 1895 (p. 67) per Chatterjee J. (1), disapproved, 91 P. R. 1911 (p. 325) (2), referred to.

Held further, that judgments shewing the existence of the custom in adjacent Mohallas, though they cannot by themselves prove the existence of the custom in the Mohalla itself, are relevant evidence of its existence in that Mohalla.

Authorities cited in remark 2 at p. 207 of Rattigan's Digest of Customary Law, referred to.

Second appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore, dated the 23rd June 1914.

Kirkpatrick and Asghar Beg, for Appellant.

Muhammad Shafi, for Respondents.

The judgment of the Court was delivered by—

21st Feb. 1916.

RATTIGAN, J.—It is unnecessary for us on this second appeal to state the facts of the case for the only question upon which we are asked to give a decision and the only question urged before the lower Appellate Court, is whether the custom of pre-emption has been proved to exist in Mohalla Rahmat Ullah Qureshi, a sub-division of Lahore City.

(1) 17 P. R. 1895 (p. 67) (*Raman Mal v. Bhagat Ram*.)

(2) 91 P. R. 1911 (p. 325) (*MussammatalDurgad ev i v. Ramzan*.)

The Subordinate Judge who tried the case found that the existence of the custom had been duly established and granted plaintiff a decree for possession by pre-emption of the houses in suit upon payment of Rs. 1,162 within a specified period. The learned Divisional Judge, Major Irvine, on the other hand, upon defendants' appeal, was of a contrary opinion and held that the custom had not been proved to exist in the said sub-division. He accordingly accepted the appeal, reversed the decree of the Court of first instance and dismissed plaintiff's suit with costs. Plaintiff thereupon applied to him, under section 40 (3) of the Punjab Courts Act, XVIII of 1884 (as amended by Act I of 1912) which was then in force, for a certificate and the application was granted by order dated 30th July 1914.

Upon the strength of this certificate, plaintiff filed the present appeal to this Court and we have had the advantage of having had the whole case argued most ably and exhaustively by Mr. Kirkpatrick for the appellant and Mr. Shafi for the respondents.

The decisions of the Subordinate Judge and the Divisional Judge are both based on former judicial precedents, and neither Court has attached any weight to the other evidence adduced by the parties in the present case, indeed, the Divisional Judge's judgment makes no reference whatever to it. In argument before us also it was practically conceded that the question at issue must be determined by the former decisions to which we have referred.

We have accordingly given those decisions our most careful consideration and have examined them with reference to the criticisms of the lower Courts and of the learned counsels who represented the parties before us. As a result, we agree with the Subordinate Judge that "the weight of authorities is more "in favour of the existence of the custom of pre-emption in "Mohalla Rahmat Ullah Qureshi," than against it.

In the present case the learned Divisional Judge bases his finding against the existence of the custom upon (i) a decision of Mr. Martineau, then Divisional Judge of Lahore, in the case of *Mussammatt Subhan Bibi v. Didar Bakhsh*, in 1905; and (ii) a decision of his own, when Additional Divisional Judge of Lahore, in the case of *S. Raghbir Singh v. Amir Bakhsh*, in 1909, and upon the fact that in both the said cases petitions for revision were rejected by this Court.

In the latter case, the Additional Divisional Judge dismissed the claim for pre-emption mainly on the ground that the

property was situate within the Mohalla Rahmat Ullah Qureshi and that the decision of Mr. Martineau in the earlier case, a decision which had been upheld by this Court's order in revision was good authority for holding that no custom of pre-emption existed in the said Mohalla. The claim was also rejected on other grounds peculiar to the case itself and not relevant for our present purposes, except in so far that the petition for revision filed in this Court was rejected in consequence of those findings. It will be seen, then, that so far as the general question before us is concerned, the decisions of the Divisional Judge in the present case and of the same learned Judge in the earlier case decided by himself in 1909, depend upon the soundness of Mr. Martineau's judgment in Mussammatt Subhan Bibi's case.

In support of this judgment it is urged that a petition for revision, filed under section 70 (1) (b) of the former Punjab Courts Act, was rejected by this Court. This, no doubt, is the case, but speaking with every deference, we cannot accept that summary order, passed at a preliminary hearing, as carrying the authority of the decision much further. We have now to consider for ourselves, with all the facts before us and after hearing lengthy arguments, whether that decision should or should not be followed, and in order to arrive at a proper conclusion we must examine the grounds upon which it was based.

It is to be noted that in that case the Munsif found that the existence of the custom had been duly established, and that Mr. Martineau commences his judgment with the words "it is *doubtful* whether the Munsif's finding is right." He then proceeds to point out that "the evidence shows that there have been many sales to strangers which have not been disputed;" and that in one of the seven deeds of sale filed in the case the words "*haq shufa*" occur after the name of the vendee but that no such words occur in the other deeds. But though referring to this evidence, he obviously did not attach much weight, one way or the other, to it, and rightly so, as it is unsafe to assume that no custom of pre-emption exists simply from the fact that a number of sales have been left unchallenged. It may often happen that a person who has an undoubted right of pre-emption is for reasons of his own either unwilling or unable to exercise it.

The learned Judge held, and rightly, that the burden of proof rested upon the plaintiff to establish the right he claimed and he came to the conclusion that the five judicial decisions

adduced by the plaintiff in support of his claim were, for various reasons, not sufficient to discharge the onus. The decisions in question were as follows :—

(i) *Chiragh Din v. Mehr Din*, decided on the 27th June 1898. Mr. Martineau treats this case as of no value because after suit was brought the vendee surrendered the house to the plaintiff-pre-emptor, on receipt of the full price, and he observes that the vendee may well have thought it wiser to give up the house and take back his money than to incur the expense of fighting out the case in Court. That doubtless may have been the case, but we cannot, with every deference, accept Chatterji, J's. very broad statement, in No. 17 *P. R.* 1895, (at page 67 (1)), that "the admission of plaintiff's right by the "defendant renders the case valueless as a precedent regarding "custom."

In our opinion, this proposition is stated far too widely. As we ventured to observe in No. 91 *P. R.* 1911 (at page 325) (2) "cases in which the vendees admit the custom of pre-emption "are as valuable as cases in which the Court finds the existence "of the custom established," though as we went on to point out, a distinction certainly does exist between such cases and those cases in which the vendee after denying the existence of the custom, eventually is induced to come to terms with the pre-emptor and to compromise the dispute. But we cannot admit that a case where a claim is made to pre-empt property on the basis of a customary right and eventually succeeds, whether by compromise or otherwise, is wholly devoid of value as a precedent, for it certainly proves this much, if nothing more, that the customary right was alleged to exist and that the claim succeeded. To this extent, therefore, the precedent with which we are dealing is relevant and so far as it goes, it assuredly is more in favour of the pre-emptor than against him, though standing by itself it might well be held insufficient to prove the existence of the custom.

(ii) *Chiragh v. Amir Bakhsh*, (decided by Mr. Swift, as a Munsif, 2nd class, on the 20th October 1896). In this case plaintiff sued for possession of one-third of a house by right of inheritance, and of two-thirds by right of pre-emption. The dispute was referred to arbitration and Mr. Martineau is in error in saying that the award made no mention of the right of pre-emption. We presume that the terms of the award are correctly set forth in the Munsif's judgment, where it is stated

(1) 17 *P. R.* 1895 (p. 67) (*Raman Mal v. Bhagat Ram*.)

(2) 91 *P. R.* 1911 (p. 325) (*Mussammat Durga Devi v. Ramzan*.)

that a decree is to be given to plaintiff in terms of the award, for possession of one-third share in the house by right of inheritance and of two-thirds by right of pre-emption, on payment by plaintiff of Rs. 268 to the vendee. Mr. Martineau holds that this precedent is valueless because (as he erroneously supposed) the award made no reference to plaintiff's right of pre-emption.

Mr. Shafi seeing that this objection was not tenable, asserted that the instance in question could not be treated as of any value because the arbitrators made no inquiry into the existence of the custom. This, however, is pure assumption on the learned counsel's part and we see no reason for supposing that the arbitrators decided in favour of plaintiff on no grounds whatever. Presumably their decision was given in his favour either because they had satisfied themselves by due enquiry that the custom existed, or because they of their own knowledge were well aware of its existence. We regard this precedent as a strong piece of evidence in favour of present plaintiff's allegation.

(iii) *Karim Bakhsh v. Jawahir* (decided by a Munsif on the 14th February 1890). This precedent is rejected by Mr. Martineau on the ground that the question whether the right of pre-emption existed was not put in issue. Literally this is correct, but the learned Judge was not justified in throwing the case aside on that ground. The Munsif in his judgment points out that the existence of the right of pre-emption by custom is admitted and that the vendee's sole defence (which he failed to establish) was that the plaintiff pre-emptor had no superior right, as he (the vendee) was a co-sharer in the house.

Here, again, the precedent appears to us to tell strongly in present plaintiff's favour. The vendee in the case under consideration was obviously anxious to keep the house and to defeat plaintiff's claim; but found it impossible to deny the existence of the custom and had perforce to rely on his alleged equal rights. To urge, as Mr. Shafi did, that the admission by parties of the existence of the custom is worth next to nothing, is absurd in a case of this kind where the vendee was strenuously contesting plaintiff's claim and would certainly have put plaintiff to the proof of the existence of the custom, had he entertained any hope of the success of that plea.

(iv) *Mussammat Subhan Bibi v. Rum Rottan* (decided in 1883). Mr. Martineau discards this precedent inasmuch as it relates to house property in the adjoining Mohalla (Kazi

Nur Din). We admit that this is not a direct authority in favour of plaintiff, but instances of custom from *adjoining* Mohallas are relevant evidence and not wholly valueless when there is other evidence to prove the existence of the custom in the Mohalla concerned.

(v) *Mehraj Din v. Muhammad Sharif* (decided in 1899 by the Munsif and in 1900 by the Divisional Judge). The house here in dispute is situate very close to the house which is the subject matter of the present suit. The Munsif found that the custom of pre-emption existed in the Mohalla Rahmat Ullah and decreed the claim. The Divisional Judge dismissed the vendee's appeal but his judgment has been criticised by Mr. Martineau and may be admitted to be unsatisfactory. The fact, however, remains that the custom was found to exist in this Mohalla by the Munsif whose judgment was maintained, though possibly on irrelevant grounds, by the Divisional Judge. The case thus remains as a precedent, even if it is based merely on the Munsif's judgment, and we cannot *assume* that the Divisional Judge would have reversed the finding had he realized that the *Guzar Raria* was not a sub-division of Lahore City.

Summing up, then, we find that of the five precedents with which Mr. Martineau had to deal, Nos. (ii), (iii) and (v) were directly in point and in favour of the pre-emptor's contention; that No. (i) also lends support to his contention and that No. (iv) was relevant as showing that the custom existed in the adjacent Mohalla.

In our opinion these precedents were erroneously regarded by him as valueless and as insufficient to discharge the *onus* resting on the plaintiff, and as his judgment is based merely on his estimate of these precedents, we cannot regard it as an authority against the present claim.

The net result is, that on the one hand, in favour of the vendee-defendant, we have Major Irvine's two judgments which are based upon the decision of Mr. Martineau while the latter decision is, in our opinion, based on an erroneous estimate of the precedents cited before him; and that on the other hand, we have, in favour of the plaintiff-pre-emptor, the precedents above referred to.

There is also another old precedent relating to house property in this very Mohalla, the case of *Karim Bakhsh v. Allah Bakhsh*. This precedent is valuable as showing that so long ago as in 1873 a right to pre-empt house property in this sub-division was set up, and though the Commissioner who

decided the case, on the 12th February 1873, does not discuss the question, he undoubtedly concludes his judgment by stating that he grants plaintiff a decree for his own half of the house and also for the other half by right of pre-emption. The case came up to this Court on appeal, but the appeal was dismissed on grounds not relevant to the question now before us.

Again in the case of *Nur Ilahi v. Allah Bakhsh*, the District Judge (Exhibit K., dated 12th April 1892), and the Divisional Judge (Exhibit L., dated 24th August 1892) found that the custom of pre-emption existed in this very Mohalla. It is true that on appeal this Court reversed the decrees of the lower Courts, but it did so on the ground that the alleged sale was in fact a mortgage as it purported to be (Exhibit M). The reversal of the decrees on this ground does not appreciably affect the value of the lower Court's judgment upon the point of custom.

It has also been found that the custom of pre-emption exists in the Mohallas actually adjacent to the Mohalla Rahmat Ullah Qureshi (see *Karim Bakhsh v. Hussain Bakhsh*), (Exhibit C. I.), decided by Mr. Tapp on the 22nd December 1904) as regards Mohalla Alawal; *Khair-ud-Din v. Rahim Bakhsh* (Exhibit J, decided by this Court on 18th November 1897), as regards Mohalla Abdul Muali, *Din Muhammad v. Allah Bakhsh* (Exhibit E. I., decided by the District Judge, Lahore, on 24th November 1904), as regards Mohalla Kazi Nur Din and also as regards the same Mohalla the case of *Mussammat Subhan Bibi v. Ram Rattan* (above referred to) and *Jalal-ud Din v. Allah Bakhsh*, decided by the Divisional Judge, Lahore, on the 27th January 1912.

These instances cannot of themselves, of course, prove the existence of the custom in Mohalla Rahmat Ullah Qureshi which they adjoin, but they are relevant evidence of its existence in the latter Mohalla (see authorities cited in remark 2 at page 207 of the "Digest of Customary Law")

Mr. Shafi referred us to a judgment delivered by M. Abdul Hamid, Munsif in the case of *Mirza Farzand Ali v. Mirza Asad Beg*, but this authority does not help him appreciably. The judgment was delivered on the 14th March 1914 and is based solely on a consideration of the precedents to which we have referred.

Taking then all the evidence before us into consideration and after giving due weight to Mr. Shafi's arguments, we are of opinion that plaintiff has proved the existence of the right of pre-emption in this sub-division of Lahore City. We accordingly

accept the appeal and reversing the decree of the Lower Appellate Court we restore that of the Subordinate Judge.

The decretal amount (Rs. 1,165) if not already deposited in cash, must be paid into Court by plaintiff within two months from this date, in default the suit to stand dismissed with costs. If the amount is paid into Court as aforesaid, defendant vendee must pay plaintiff's costs throughout.

Appeal accepted.

No. 78.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

PARMA DAT—(DEFENDANT)—PETITIONER,

Versus

BIPJU—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 8 of 1915.

Arbitration—award—revision from decree—material irregularity—Civil Procedure Code, Act V of 1908, schedule II, article 12—extent of Court's power to modify award—jurisdiction.

Held, that material irregularity on the part of the Court in dealing with objections to an award of arbitrators is a ground for revision, though it is no ground for revision that the arbitrator himself has been guilty of some misconduct and that the Court has wrongly adjudicated upon the objections raised regarding that misconduct.

Held also, that modifications and corrections of an award by the Court must be confined to the limits laid down in schedule II, article 12 of the Code of Civil Procedure and a Court acts without jurisdiction if it goes beyond that and makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances.

Revision from the decree of J. K. M. Tapp, Esquire, District Judge, Kangra, at Dharmsala, dated the 31st July 1914.

Sohan Lal, for Petitioner.

Ghulam Muhammad, for Respondent.

The order of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—This case has been dragging on in the Courts since the 24th of August 1899, and it is matter for regret that so far little real progress has been made towards the decision of it. As the judgment of the lower Court shews it has been bandied about between the Courts for some sixteen years, having been remanded for the last time by the Chief Court on the 13th of June 1910 (see Civil Appeal No. 1158 of 1903). The learned Judges who disposed of the case remarked "We must therefore again

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“set aside the proceedings of the lower Court and remand the case for a fresh trial, and we hope that on this occasion the learned District Judge will proceed according to law.” Even this warning has not been sufficient to ensure that the lower Court should proceed according to law. The case has been handled by a great many different officers, and it is a surprising thing how many of them seem to be imperfectly acquainted with the Civil Procedure Code.

As the record shews, on the 17th November 1911 the parties agreed to refer certain questions to an arbitrator, Mr. Daulat Ram. The arbitrator was to decide—

- (1) Who is to pay the costs of the case ?
- (2) What is the joint property belonging to the parties and in whose possession is each portion of it ?
- (3) How should the property found joint be divided between the parties *ba-lihaz qabza* ?
- (4) Apart from culturable land what is the value of each part of the other property ?

Now the order of remand aforesaid set aside the whole of the proceedings up to date, and thereafter the Court framed only two issues, on the 17th December 1910 and the 20th December 1910, respectively, namely—

- (1) Can plaintiff sue for part only of the joint property ?
- (2) What is the family's property now in existence ?

The first issue was found against the plaintiff, when it was held that plaintiff could not sue for portion only of the joint property. It seems to me a matter of some doubt whether these two issues were in any case sufficient for final decision of the case and it is also doubtful whether an award strictly confined to the terms of reference aforesaid would suffice for the final decision of the case.

When the award was put in, voluminous objections were filed by both the parties, which objections were more or less summarily dealt with, and in the end the lower Court, having modified the award in important particulars, passed a decree upon the basis of the award so modified. It is also to be noted that the award originally presented was remitted for reconsideration and was amended by the arbitrator himself. It was this amended award which was further modified as aforesaid.

The defendant comes up here with a revision petition. The limits within which such revision is possible are well known. In my opinion material irregularity on the part of

the Court in dealing with objections is a ground for revision, though it is no ground for revision that the arbitrator himself had been guilty of some misconduct, and that the Court had wrongly adjudicated upon the objection raised regarding that misconduct. Only two points have been argued on behalf of the petitioner. The first is that the Court materially erred when on the 31st October 1913 it refused to call the arbitrator to answer questions which the petitioner wished to put to him regarding his conduct of the proceedings. The second is that the arbitrator himself on the 26th of May 1912 refused to summon a certain witness because that witness had already been examined in Court. In my opinion the second of these points has no value and is not a proper subject for revision, but the Court certainly should have called the arbitrator as a witness when the petitioner applied that he should be summoned. I must therefore, though I do it with great reluctance, again remand the case in order that the Court may summon the arbitrator and allow the petitioner to examine him regarding his proceedings. A return to this should be made within two months.

I take this opportunity of pointing out that the lower Court appears to me to have overlooked article 12, II Schedule, Civil Procedure Code, which lays down the circumstances under which a Court may modify or correct an award. The two or three modifications which the lower Court has introduced into the award do not fall under that article. They are substantial modifications, made by the Court because it took a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances.

Now under the article the Court may only modify or correct an award, first by striking out of it something not referred to arbitrator; secondly, by amending imperfections *in form* or correcting *any obvious error* which can be amended without affecting the decision of the case; and thirdly, where the award contains a *clerical mistake* or an error arising from an *accidental slip or omission*. The Court therefore, as it seems to me, acted entirely without jurisdiction in making the modifications to the award which it has made.

The result therefore is that, if in the end this Court decides that the award should not be set aside on the ground of misconduct on the part of the arbitrator, it will probably be necessary to give plaintiff a decree exactly in accordance with the award as made by the arbitrator himself. See order of remand above.

No. 79.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

GURAN RAKHA—(PLAINTIFF)—APPELLANT,

Versus

BINDRABAN AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2942 of 1915.

Indian Limitation Act, IX of 1908, sections 5 and 12—sufficient cause for delay in presenting an appeal—period during which copies can be applied for.

On the 5th October 1915 appellant presented an appeal to the Chief Court against the judgment of the Additional District Judge of Ferozepore, dated 2nd July 1915, i. e. on the 95th day excluding the day of delivery of judgment. The appellant did not apply for copy until the 1st October (the 30th September being a holiday) and received it on the 4th October.

Held, that the appeal was filed too late, being presented on the 91st day (excluding the 4 days spent in obtaining a copy) and that no allowance of time was by law admissible because 30th September was a holiday.

I. L. R. 25 Bom. 584 (1) and I. L. R. 25 Bom. 586 (2), referred to.

Held also, that indulgence under section 5 of the Limitation Act on the ground of a mistake is only allowed where it is shewn that the appellant has acted with due care and diligence.

Second appeal from the decree of J. A. Ross, Esquire, Additional District Judge of Ferozepore, at Ludhiana, dated the 2nd July 1915.

Charat Singh, for Appellant.

Nand Lal, for Respondents.

The judgment of the learned Chief Judge was as follows :—

22nd Feb. 1916.

SIR DONALD JOHNSTONE, C. J.—In this case a preliminary objection has been raised to the effect that the appeal is barred by time. The judgment of the Lower Appellate Court bears date the 2nd July 1915, and the present appeal was filed in this Court on the 5th October 1915, that is to say, on the 95th day, excluding, as the law requires, the day of delivery of judgment. The appellant did not apply for copy until the 1st October, that is to say, the 91st day. He received his copy on the 4th October and presented his appeal the next day. In my opinion the proper way of dealing with the matter is to deduct 4 from 95, which leaves 91, and to hold that the appeal is barred by time.

The learned pleader for the appellant argued his client's case on two grounds, first, that in accordance with law, as

(1) (1901) *I. L. R. 25 Bom. 584 (Tukaram Gopal v. Pandurang).*

(2) (1901) *I. L. R. 25 Bom. 586 (Pandhari Nath v. Shankar Narayan).*

laid down in *I. L. R. 25 Bom. 584* (1) and also *I. L. R. 25 Bom. 586* (2), the appeal is within time; and secondly, that indulgence should be given under section 5 of the Limitation Act in view of the appellant's affidavit. I have seen the two rulings quoted, and I do not consider that they bear the meaning attributed to them by Mr. Charat Singh.

In the first of the rulings it was held that "so long as the right of appeal is subsisting an appellant is entitled under section 12 of the Limitation Act (XV of 1877) to apply for a copy of the lower Court's decree. The time requisite for obtaining such copy should be excluded in computing the period of limitation prescribed for the appeal." But in the present case time, that is to say, 90 days, had already expired before the appellant applied for copy. It expired on the 30th September, and there is no foundation for the contention that the mere fact of that day being a holiday helps the appellant in any way.

No doubt the law is that, if an appellant is ready to present his appeal on the last day of limitation, and on that day the Court is closed, *presentation* on the first open day is sufficient. But this is quite different from saying that, *in the matter of applying for copies*, an appellant can be allowed to let the whole of the period allowed for appeal expire and then take advantage of a holiday which happens to occur towards the end of that period. I know of no authority in support of such a proposition. The second ruling is much to the same effect as the first, and also does not help the appellant. As to the request for indulgence.

I find from the affidavit put in that all the appellant can say is that he imagined the Chief Court did not open until the 15th October 1915. It has always been held that indulgence under section 5 on the ground of a mistake is only allowed where it is shown that the appellant has acted with due care and diligence. Now it is absurd to suppose that a man of some intelligence, who had legal advice available, can have acted with due care and diligence in making a mistake like this. On the contrary it was extremely careless on his part to delay applying for copies so long, and he could easily have ascertained the date of this Court's opening.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

(1) (1901) *I. L. R. 25 Bom. 584* (*Tukaram Gopal v. Pandurang*).

(2) (1901) *I. L. R. 25 Bom. 586* (*Pandhari Nath v. Shankar Narayan*).

No. 80.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

DAYA RAM AND OTHERS—(DEFENDANTS)—
PETITIONERS,

Versus

MUSSAMMAT JATTI—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 866 of 1915.

Civil Procedure Code, Act V of 1908, order 20, rule 2—validity of judgment of a Judge written after he has been transferred and pronounced by himself.

Held, that a judgment written by a Judge who heard the case, after his transfer, is not illegal—*vide* order 20, rule 2 of the Code of Civil Procedure, and the fact that the transferred officer himself pronounced the judgment does not make any difference.

I, L. R. 30 Bom. 241 (1) and I. L. R. 34 Cal. 293 (2), referred to.

Revision from the order of Mr. Harsukh Rai, Senior Subordinate Judge, Amritsar, dated the 2nd October 1915.

Nand Lal, for Petitioners.

Todar Mal, for Respondent.

The judgment of the learned Chief Judge was as follows :—

23rd Feb. 1916.

SIR DONALD JOHNSTONE, C. J.—In this case a revision has been filed in which the only point which requires discussion is whether the order under revision having been delivered by Mr. Harsukh Rai as Senior Subordinate Judge of Amritsar on the 2nd October 1915, is a nullity because, as is alleged, Mr. Harsukh Rai ceased to be Senior Subordinate Judge on the forenoon of that day. It is alleged that the order was delivered on the afternoon of the 2nd October. Efforts have been made to discover exactly when Mr. Harsukh Rai gave over charge to Diwan Som Nath, and all I can find is that Diwan Som Nath took over charge of the office of Senior Subordinate Judge on the forenoon of the 2nd October. I am asked to assume from this that Mr. Harsukh Rai was no longer Senior Subordinate Judge after midday of that day. Of course he may have ceased to be Senior Subordinate Judge some time previously, but there can be no doubt that the case was heard by Mr. Harsukh Rai, and in these circumstances, under order 20, rule 2 of the Civil Procedure Code, interpreted in the manner adopted in *I. L. R. 30*

(1) (1905) *I. L. R. 30 Bom. 241 (Girjashankar Narsiram v. Gopalji Gulabbhai).*

(2) (1907) *I. L. R. 34 Cal. 293 (Sundar Kuar v. Chandreshwar Prasad).*

Bom. 21 (1) and I. L. R. 34 Cal. 293 (2) I must hold that the order complained of is not illegal, because it may have been written by Mr. Harsukh Rai after he had been transferred.

No doubt in those two rulings the judgments were written by the transferred officers and delivered by the new incumbents, while Mr. Harsukh Rai himself appears to have actually pronounced this order, but I do not think that this really makes any difference. What the legislature intended evidently was that an order passed by an officer, who had heard the case and had given his mind to the matter, is no less legal because it was written after he gave over charge of his office.

For these reasons I dismiss the revision with costs.

Appeal dismissed.

No. 81.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

JOWALA SINGH—(DEFENDANT)—APPELLANT,

Versus

LAKHA SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 3133 of 1915.

Second appeal—on ground of misreading of evidence.

Held, that misreading of evidence may afford sufficient reason for the Chief Court's interference on second appeal.

*Second appeal from the decree of O. F. Lumsden, Esquire,
District Judge, Lahore, dated the 7th May 1915.*

Mehr Chand, for Appellant.

Duni Chand, for Respondents.

The judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—Badhawa Singh, childless proprietor, who died three and-a-half years before suit, had more than a year earlier sold ancestral land for Rs. 2,000. His reversioners sue for possession on the usual grounds. The first Court held that, out of the consideration recorded in the sale-deed, namely, Rs. 1,200 to be paid by vendee to previous mortgagees, Rs. 600 cash paid to vendor in village and Rs. 200 paid before Sub-Registrar, only Rs. 1,200 admitted by plaintiffs, could be said to be for "necessity." The passing of the Rs. 600 item was entirely disbelieved, and "necessity" for the Rs. 200 item was denied because vendor was a bad character. At the same time the first

23rd Feb 1916.

(1) (1905) *I. L. R. 30 Bom. 241* (*Girjashankar Narsiram v. Gopalji Gulabbhai*).

(2) (1907) *I. L. R. 34 Cal. 293* (*Sundar Kuar v. Chandreshwar Prasad*).

Court seems to admit that vendee really paid Rs. 1,566 and not Rs. 1,200 to the previous mortgagees. It, however, refused to allow more than Rs. 1,200, and so gave a decree for possession of the land on payment of one-third of Rs. 1,200, one-third being declared plaintiffs' share.

Vendee appealed. The Lower Appellate Court doubted whether the extra Rs. 366 ever passed to previous mortgagees, the doubt being the result of two misreadings of the evidence on the record : the Court took it that on the footing of the mortgage only Rs. 1,200 and not Rs. 1,566 was due, and secondly, that Jowala Singh, vendee, had practically admitted in his statement on solemn affirmation that he had paid only Rs. 1,200 accounting for the rest of the Rs. 2,000 without bringing in the extra Rs. 366 aforesaid. Now in the mortgage deed the condition was that on Rs. 400 no interest should be charged, but on the remaining Rs. 100 interest at 24 per cent. per annum should be paid. At this rate the interest due at time of sale would be some Rs. 360, so that the Lower Appellate Court was wrong in supposing that there was no occasion to pay more than Rs. 1,200. Again, Jowala Singh in his statement aforesaid was not stating all that he had paid he was merely stating how the Rs. 2,000 was made up. His case is that he paid the extra Rs. 366 *in addition* out of his own pocket to pacify the previous mortgagees.

In my opinion this sort of misreading of evidence affords sufficient reason for this Court to interfere on second appeal. I therefore accept this appeal and modify the decree by adding Rs. 122 (one-third of Rs. 366) to the amount plaintiffs must pay to defendant-vendee before they can recover possession.

Parties to bear their own costs here and in Lower Appellate Court.

Appeal accepted.

No. 82.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

BANI SINGH AND OTHERS—(DEFENDANTS),
—APPELLANTS,

Versus

SURAT SINGH AND OTHERS—(PLAINTIFFS)—AND
PEMAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2320 of 1913.

Punjab Courts Act, III of 1914, section 41 (3)—certificate for second appeal on point of custom—when to be granted.

Held, that the certificate referred to in section 41 (3) of the Courts Act should be granted only when the Lower Appellate Court can certify that the evidence regarding custom is so conflicting or uncertain that there is such substantial doubt regarding its existence as to justify a second appeal and that the Chief Court will not act upon a certificate which should not have been granted having regard to the terms aforesaid.

Second appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi, dated the 24th May 1913.

Nand Lal, for Appellants.

Moti Sagar, for Respondents.

The judgment of the Court was delivered by—

SHADI LAL, J.—We are clear that no certificate should 24th Feb. 1916.
have been granted in the present case, and that the appellants are precluded from impugning the finding against them on the extraordinary custom set up by them that they, as proprietors holding land in the same *patti* as the land held by the deceased, were entitled to inherit it to the exclusion of the other collaterals. The certificate in question is in the following terms:—

“I would willingly give a certificate but am doubtful
“whether I can legally do so, as I have to be satisfied in
“addition to the custom that the evidence regarding it is
“so conflicting or uncertain that there is substantial doubt
“as to the existence of the custom. “Hence (here ?) there
“is no evidence of the custom, but a solitary instance in
“which it was apparently followed and this occurred so long
“back that it cannot be explained by anyone. If I have
“the power notwithstanding this to grant the certificate,
“defendants are welcome to a certificate, but I have my
“doubts. However I grant the application.”

Now section 41 (3) of the Punjab Courts Act lays down as a condition precedent to the granting of a certificate that the Judge of the Lower Appellate Court must certify that the evidence regarding custom is so conflicting or uncertain that there is such substantial doubt regarding its existence as to justify a second appeal. Here it is beyond question that the learned Additional Divisional Judge was of opinion that, far from there being any conflicting or uncertain evidence to warrant a substantial doubt as to the existence of the custom, there was no evidence worth the name in support thereof. It appears to us that the learned Judge would have refused the application for certificate, if he had not entertained doubts as to his power to do so. Accordingly we decline to act upon a certificate of this kind, which under the law

contained in the aforesaid section of the Punjab Courts Act could not have been granted.

As regards the contention that there was a complete and valid compromise outside the Court, by which the dispute between the parties was adjusted, it is sufficient to remark that on the facts as found by the Lower Appellate Court it is abundantly clear that some of the plaintiffs, who are minors and females, were not even present before the *panchayat*, which met at the *chaupal* to bring about a settlement, and that the appellants themselves withdrew from the alleged settlement or compromise by not giving 100 *bighas* of land to the plaintiffs and by getting a mutation in their own favour for the entire estate. The Courts below have rightly overruled this plea, which is wholly unsustainable.

Upon these findings the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

No 83.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

SAJJAD ALI AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MUHAMMAD ZULFIKAR ALI KHAN—(DEFENDANT)
—RESPONDENT.

Civil Appeal No. 1806 of 1912.

Indian Limitation Act, IX of 1908, articles 44, 91 and 144—alienation by major brother of his minor brothers' shares in land—suit by latter to recover their shares—limitation—guardianship—Muhammadan Law—de facto guardian.

Held, that under Muhammadan Law a brother is not a guardian of the property of his minor brothers and that the latter can consequently on attaining majority treat any alienation of their land by their brother as a nullity and a suit to recover possession of it is governed by article 144 and not by article 44 or article 91 of the Limitation Act.

73 P. R. 1890 (F. B.) (1), 28 P. R. 1909 (2), 15 P. R. 1913 (3), and I. L. R. 32 All. 392 (4), referred to.

57 P. R. 1891 (5) and 19 P. R. 1902 (6), distinguished.

(1) 73 P. R. 1890 (F. B.) (*Mastu v. Nand Lal*).

(2) 28 P. R. 1909 (*Sardar Shah v. Haji*).

(3) 15 P. R. 1913 (*Utam Singh v. Gurmukh Singh*).

(4) (1910) I. L. R. 32 All. 392 (*Bachchan Singh v. Kamta Prasad*).

(5) 57 P. R. 1891 (*Ghulam Rasul v. Ajab Gul*).

(6) 19 P. R. 1902 (*Said Shah v. Abdulla Shah*).

Held also, that it is now a firmly established proposition of law that article 91 is restricted to a suit between the parties to the instrument or their successors in interest and that a plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor in title.

23 P. R. 1904 (1) must be held to have been overruled by I. L. R. 34 All. 213 (P. C.) (2).

Held further, that the situation of an unauthorised guardian is not bettered by describing him as a *de facto* guardian.

I. L. R. 34 All. 213 (P. C.) (2), referred to.

Second appeal from the decree of Lieutenant-Colonel G. C. Beudon, Divisional Judge, Ambala, dated the 15th January 1912.

Fazl-i-Hussain, for Appellants.

Muhammad Shafi, for Respondent.

The judgment of the Court was delivered by—

SHADI LAL, J.—The action, out of which this appeal has arisen, was brought by two brothers to recover possession of their land sold by a third brother, Izaz Ali, during their minority. The learned Divisional Judge concurring with the Court of first instance has held that the *quondam* minors attained their majority more than three years prior to the date of the institution of the suit, and that articles 44 and 91 prescribed the period of limitation applicable thereto; and he has consequently dismissed the suit. 25th Feb. 1916.

Now it is beyond dispute that the plaintiffs who are Muhammadans, are governed by the Muhammadan Law and it is manifest that under the provisions of that law relating to the guardianship of property a brother is not a guardian of the property of his minor brothers. It is further clear that Izaz Ali was never appointed a guardian by any Court of Justice; and in these circumstances it seems to us that he had no legal authority to alienate the property of the plaintiffs, and that the latter were not bound to set aside the alienation within the shorter period prescribed by the said article.

The rule laid down by a Full Bench of this Court in 73 P. R. 1890 (3) is that a transaction of this kind may be treated as a nullity by the minor on attaining majority. This principle has been affirmed in the subsequent judgments of this Court, *vide, inter alia*, 28 F. R. 1909 (4) and 15 P. R. 1913 (5), which enunciate the principle that neither article 44

(1) 23 P. R. 1904 (*Moti Singh v. Ghasita Singh*).

(2) (1911) I. L. R. 34 All. 213 (P. C.) (*Mata Din v. Ahmad Ali*).

(3) 73 P. R. 1890 (F. B.) (*Mastu v. Nand Lal*).

(4) 28 P. R. 1909 (*Sardar Shah v. Haji*).

(5) 15 P. R. 1913 (*Utum Singh v. Gurmukh Singh*).

nor article 91 governs a suit for possession of the property and that article 144 prescribes the period of limitation applicable to it. To the same effect is the judgment of the Allahabad High Court in *I. L. R.* 32 *All.* 392 (1). The rulings in 57 *P. R.* 1891 (2) and 19 *P. R.* 1902 (3) cited on behalf of the respondents are distinguishable upon the particular facts of those cases. It appears that in the former case the learned Judge regarded the brother, who had been appointed *sarbarah* by the Revenue Authorities for the management of land, as competent to make an alienation of the minor's property, and that in the latter case the brother was customary guardian as stated in the record of rights. In the case before us the brother was not entitled under law or custom to act as guardian so as to bind his brothers' property by any alienation effected by him.

The proposition of law is now firmly established that article 91 is restricted to a suit between the parties to the instrument or their successors-in-interest, and that a plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor-in-title. In view of the judgments cited above and the decision of the Privy Council to be referred to hereafter we are unable to hold on the authority of 23 *P. R.* 1904 (4) that the suit is barred under the provisions of article 91.

If there was any doubt on the subject, it has been set at rest by the recent authoritative pronouncement by their Lordships of the Privy Council in *I. L. R.* 34 *All.* 213 (5), which lays down that article 144, and not article 44, governs a suit for possession of the immoveable property alienated by a person, who is neither a guardian by Muhammadan Law nor by appointment by Court. The expression "*de facto* guardian" used by the learned Divisional Judge is misleading, and there is no legal foundation for it. The following observations of their Lordships are apposite here:—

"It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing

(1) (1910) *I. L. R.* 32 *All.* 392 (*Bachchan Singh v. Kamta Prasad*).

(2) 57 *P. R.* 1891 (*Ghulam Rasul v. Ajab Gul*).

(3) 19 *P. R.* 1902 (*Said Shah v. Abdullah Shah*).

(4) 23 *P. R.* 1904 (*Moti Singh v. Ghasita Singh*).

(5) (1911) *I. L. R.* 34 *All.* 213 (*P. C.*) (*Mata Din v. Ahmad Ali*).

“him as a *de facto* guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.”

We must, therefore, hold that the suit of the plaintiff which was instituted within the period prescribed by article 144 is well within time and that the judgment of the Lower Appellate Court must be reversed. Before concluding we may state that Wajid Ali, one of the appellants, died on the 21st of April 1915, during the pendency of the appeal in this Court, and that the application to implead his minor sons as his representatives was made on the 3rd of January 1916 after the expiry of six months. Considering that the widow, who made the application, is a *parda nashin* lady and was, as she alleges, unaware of the fact that the appeal was pending in this Court, and that the legal representatives are minors, we extended the time prescribed by law, granted the application, and heard the appeal.

The result is that we accept the appeal and setting aside the decree of the learned Divisional Judge we remand the case under order 41, rule 23, for decision on the merits. The Court-fee on the memorandum of appeal shall be refunded and other costs shall be costs in the cause.

Appeal accepted.

No. 84.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

MUSSAMMAT MURAD KHATUN—(PLAINTIFF)—
APPELLANT,

Versus

MUHAMMAD BAKHSH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 413 of 1913.

Custom—succession—Bhutta Tarkhans of Multan City—Muhammadan Law.

Held, that it had not been proved that the parties, Bhutta Tarkhans, residents of Multan City, who do not own any agricultural land, are governed by agricultural custom and not by Muhammadan Law.

47 P. R. 1900 (1), referred to.

Held also, that a practice of the males excluding the females cannot be elevated to the dignity of a custom unless there is clear and cogent evidence that it has been uniform and has existed for a sufficiently long period.

Second appeal from the decree of S. Wilberforce, Esquire, Divisional Judge, Multan, dated the 8th January 1913.

Fazl-i-Hussain, for Appellant.

Oertel and Kanwar Narain, for Respondents.

The judgment of the Court was delivered by—

28th Feb. 1916.

SHADI LAL, J.—In this appeal the main question for determination, which arises upon the certificate granted by the Divisional Judge, is whether the parties, who are Bhutta Tarkhans of the Multan City, are governed by their personal law, or by custom which excludes daughters from inheriting their father's property in the presence of the sons. The pedigree-table given in the judgment of the Court of first instance explains the relationship of the different persons concerned in the case and need not be reproduced here. The plaintiff, Mussammat Murad Khatun, relying upon Muhammadan Law as supplying the rule of decision, claimed 211/1024th share in the house in dispute, partly through her mother, Mussammat Jan Ei, and partly through her father, Allah Bakhsh, and her claim was resisted by the other children of Allah Bakhsh by the second wife, Mussammat Bakhtawar who set up the usual defence of custom. The learned District Judge found that the alleged custom had not been established and granted the plaintiff a decree for one-sixth of the house.

Both the parties preferred appeals to the Divisional Judge, the defendants, Civil Appeal No. 345 of 1912, contesting the finding against them on the question of custom and asking for the dismissal of the entire suit, and the plaintiff, Civil Appeal No. 362 of 1912, praying for an increase in the share awarded by the District Judge. The learned Divisional Judge decided both the appeals by one judgment and holding that the parties were governed by custom dismissed the plaintiff's suit *in toto*. There is no doubt that there was a decree in each of these appeals, but we find that the decree drawn up in the plaintiff's appeal not only dismisses that appeal, but also embodies the result of the rival appeal by stating that the first Court's decree having been set aside, the plaintiff-appellant's suit for possession of the house was dismissed. Now the plaintiff has preferred to this Court a second appeal, and Mr. Oertel raises a preliminary objection that as she has not filed a copy of the decree drawn up in

Civil Appeal No. 345 of 1912, she is precluded from impugning the finding on the question of custom.

It will be observed that the judgment containing the above finding is before us and as stated already, the decree under appeal is one which dismisses the entire suit. In these circumstances we are not prepared to hold that the appellant's failure to file a copy of the other decree, which failure is due to a *bona fide* mistake, prevents her from attacking the decision of the Divisional Judge on the point of custom. The only result of this omission is that the order relating to costs in that appeal, not being part of the decree in Civil Appeal No. 362 of 1912, is not open to question and is consequently binding upon the plaintiff-appellant. Accordingly we overrule the preliminary objection.

Before discussing the question of custom *versus* Muhammadan Law, we must clear the ground by stating that the Lower Appellate Court has found that the house originally belonged to Yar Muhammad, and it appears that the whole of it was inherited by Kadir Bakhsh and then by Allah Bakhsh, and that no female members ever got any share therein. There is no proof of the existence of joint family, and it is manifest that each heir was entitled to claim his or her share on the death of the owner, whose estate was in dispute. Yar Muhammad, Umar, Ramzan and Kadir Bakhsh died more than twelve years prior to the suit, and limitation began to run from the date of each owner's death. It is clear that the right of inheritance of other persons became barred after the lapse of 12 years, *vide* 89 P. R 1888 (1), which is on all fours with the present case. We must, therefore, take it that Allah Bakhsh was the sole owner of the property, and the point for decision is whether the plaintiff, one of his daughters, is excluded from inheriting a share therein.

The parties are Tarkhans by profession, reside in the town of Multan, and do not own any agricultural land. The onus is, therefore, very heavy on the defendants to establish a special custom overriding the Muhammadan Law. Now the *Riwaj-i-am*, which states that certain families of Bhuttas are governed by Muhammadan Law and the rest by custom, is intended to apply to Bhutta agriculturists, and there is nothing to shew that it records a custom applicable to Bhutta Tarkhans residing in a town. The defendants have not adduced any other documentary evidence, and the oral evidence is insufficient to establish their defence. We find that

(1) 89 P. R. 1888 (*Nasir-ud-Din v. Lal Bibi*).

four witnesses, who are the descendants of a brother of Yar Muhammad, are now agriculturists in the Muzaffargarh District, and the fact, that they have now adopted the custom of other agricultural communities, has little bearing upon the rule of inheritance applicable to Bhutta Tarkhans who continued to reside in the Multan City. There are a few other witnesses of this tribe in Multan, who have given evidence to the effect that daughters and sisters in this family and other families of Tarkhans have been excluded by males. Now it appears that the females have not in some cases asserted their right of inheritance, but this is by no means a rare occurrence. It has been pointed out in more judgments than one that this practice of the males excluding the females cannot be elevated to the dignity of custom, unless there is clear and cogent evidence that it has been uniform and has existed for a sufficiently long period. This requirement of a valid custom the defendants have failed to prove, and we cannot, therefore, hold that Muhammadan Law has been superseded by a recognized custom prevailing in this community.

On the other hand, Sohara, one of the defendants' own witnesses, admits in cross-examination that if his sister claimed a share, he would not contest her right to receive it. The documents, P. 10, an agreement dated the 25th of March 1851, and P. W. 1, a mortgage-deed dated the 12th April 1887, both executed by the deceased Allah Bakhsh, contain, in unmistakable terms, admissions by him to the effect that his mother and sisters were entitled to inheritance in accordance with the Muhammadan Law. These documents are of great importance, and the fact that Allah Bakhsh did not carry out his promise to give their shares to the female relatives does not weaken the force of the clear admissions in favour of the applicability of the personal law. At any rate, they detract very much from the value of the oral instances as to the exclusion of females from inheritance in this family. We have then an adjudication by a Court of justice in 1898 (*vide* P. 5 and P. 6), by which the objections to attached property preferred by some females were accepted on the ground that Bhutta Tarkhans were governed by Muhammadan Law. To the same effect, is another objection case (*vide* P. 3 and P. 4) in which the parties were Tarkhans of the Multan City but did not, it appears, belong to the Bhutta tribe. The documents P. 7 to P. 9, relate to a case, which ended in a compromise, and do not help either party.

This is all the evidence which has been adduced on the question of custom, and upon the unsatisfactory material before us we are unable to hold that the *onus* of establishing custom, which rested very heavily upon the defendants, has been discharged. In 47 P. R. 1900 (1) a Division Bench of this Court held that among the Muhammadan carpenters, residents of the Multan City, there was no definite custom as regards succession at variance with the Muhammadan Law; and this decision, though the parties were not Bhuttas, certainly shews that the carpenters of this town do not observe custom but follow their personal law. The observation that "in the Multan District the customs of the people are less adverse to the rights of women than in the Eastern Punjab" due to the preponderance of the Muhammadans in the locality and the influence to some extent of Muhammadan Law is very apposite here.

The result is that the rule of succession applicable to the parties is that supplied by the Muhammadan Law, and it is clear that the widow, Mussammat Bakhtawar, is entitled to $1/16$ th share and that the children, namely two sons and three daughters, inherit the rest of the property, out of which the plaintiff's share is $15/16 \times 1/7 = 15/112$. We accordingly accept the appeal, and setting aside the decree of the Lower Appellate Court we pass a decree in favour of the plaintiff for $15/112$ th share of the house in dispute. As the plaintiff has not been successful in establishing the share mentioned by her in the plaint, we leave the parties to bear their own costs throughout the litigation, with the exception of the costs in Civil Appeal No. 315 of 1912 preferred by the respondents to the Divisional Court, in which the costs should be paid as directed by that Court.

Appeal accepted.

No. 85.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr.

Justice Leslie Jones.

MUSSAMMAT RALLI AND OTHERS—(PLAINTIFFS)—

APPELLANTS,

Versus

RALLA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 2394 of 1913.

Custom—succession—heterogeneous proprietary body or sister—Jats, Garhi Kanungoyan, Garhshankar Tahsil, Hoshiarpur District—Riwaj-i-am.

Held, that in a contest between a heterogeneous proprietary body of the village and a sister in the succession to the property of a deceased childless Jat proprietor, without male collaterals, of Garhi Kanungoyan, *tahsil* Garhshankar, district Hoshiarpur, the *onus* of proving a special custom entitling the proprietary body to exclude the sister was on the former and that they had failed to discharge that *onus*.

Held also, that the entry in the *Rivaj-i-am* of the settlement of 1885 in the answer of Jats to question 54, *viz.*, "no share is ever taken by the sister or sister's son" must be held to refer only to cases of succession in the presence of collaterals and had consequently no application to the present case.

136 P. R. 1884 (1), 2 P. R. (Rev). 1911 (2), 28 P. R. 1901 (3), 63 P. R. 1908 (4) and 137 P. R. 1908 (5), referred to.

Second appeal from the decree of H. A. Parker, Esquire, Divisional Judge, Hoshiarpur, dated the 4th November 1913.

Manohar Lal and Duni Chand, for Appellants.

Oertel, for Respondents.

The judgment of the Court was delivered by—

29th Feb. 1916.

LESLIE JONES, J.—Chhajju, a proprietor in the village of Garhi Kanungoyan in the Garhshankar *Tahsil* of the Hoshiarpur District was succeeded by his widow Mussammat Ati who died in 1912. Chhajju had left no descendants or male collaterals and on the death of the widow mutation was granted to the proprietors of the village.

Mussammat Ralli, the sister of Chhajju, and her son Puro, instituted the present suit for possession on the basis of inheritance, but it was dismissed by the Munsif on the ground that they had failed to establish a custom under which a sister is entitled to succeed, and the same view was taken by the learned Divisional Judge, who has, however, granted a certificate on which the plaintiffs' suit has been admitted to a second appeal.

The proprietary body of the village is very heterogeneous consisting of Khatriis, Lohars and some Muhammadans as well as Jats. The learned Divisional Judge recognised that their position was not a strong one, and he has stated that he would have followed 63 P. R. 1908 (4) (a Hoshiarpur case in which a grandson of a grand aunt of the deceased was held to have preference over the proprietary body), but for the fact that that was a case which related not to Jats but

(1) 136 P. R. 1884 (*Mussammat Ghausan v. Shahzada*).

(2) 2 P. R. (Rev). 1911 (*Wazira v. Mangal*).

(3) 28 P. R. 1904 (*Bishen Singh v. Bhagwan Singh*).

(4) 63 P. R. 1908 (*Waryama v. Hira*).

(5) 137 P. R. 1908 (*Nihala v. Rahmatullah*).

to Rathis. For that reason he considered that the ruling in question was not of direct application, and finding that in the answer of the Jats to question 54 of the *Riwaj-i-am* of the settlement of 1885 it is stated that "no share is ever taken by the sister or sister's son" he held that the custom which the plaintiff sought to establish was not proved.

The *Riwaj-i-am* of 1885 contains no indication that the answer quoted was meant to relate to anything more than the rights of a sister or her son as against collaterals. Certainly no direct question concerning her rights as against a heterogeneous proprietary body was ever put.

We notice too that in the customary law of the same district compiled in 1914 at the last settlement, the Settlement Officer has noted as an exception a case of Hindu Jats from the Dasuya *Tahsil* in which sister's sons successfully established a claim against the step-father of the deceased, the proprietary body apparently making no claim; and it is clear from the answer of some other tribes that the right of the sister is recognised where there are no collaterals.

The only instance which can be cited on behalf of the proprietors happens indeed to be one relating to this very village. It was a case in which sister's sons eventually withdrew their claim against the proprietary body, as the result of a compromise. But the compromise was effected only after the suit had been remanded by the Divisional Judge who had placed the burden of proof on them. It must further be remembered that this suit was decided in 1894 at a time when the rights of females received very slight recognition at the hands of the Courts.

136 P. R. 1884 (1) is an authority for holding that it is for strangers to shew that the custom of female exclusion is absolute and would go to bar a sister where no ancestral connection could be shewn in the stranger's favour. Without going so far as to subscribe to that dictum in its entirety, we are of opinion that it holds good at least as against a non-homogeneous proprietary body.

In 2 P. R. (Rev.) 1911 (2) the then Financial Commissioner discussed fully the question of the right of a proprietary body to succeed, and he laid down that it can only arise in the absence of relatives entitled to succeed *by law or custom*, the right of the proprietary body being primarily

(1) 136 P. R. 1884 (*Mussammat Ghausan v. Shahzada*).

(2) 2 P. R. (Rev.) 1911 (*Wazira v. Mangal*).

based on real or assumed relationship to the holder of the land or to the member of the proprietary body from whom his title was derived; and that such right should not be assumed in the case of heterogeneous estates.

Again under article 28 of Rattigan's Digest the commentary emphasises the fact that in joint estates where a complete community of interests is maintained, the succession of the proprietary body is usually provided for in the *Wajib-ul-arz*, and it cites a case 28 P. R. 1904 (1), in which amongst the Hindu Jats of the Ambala District a sister's son was held to exclude the proprietary body. It is true that in that case the *Rivaj-i-am* was in favour of the succession of sisters failing collaterals of the fifth degree, and that certain instances have been proved, but the main emphasis was laid on the fact that the proprietary body was not homogeneous.

Another ruling on which the counsel for appellant relies is 137 P. R. 1908 (2). This was a case amongst Muhammadan Rajputs of the Karnal District in which an aunt's son was held to be entitled to succeed. It was there remarked that the entry in the *Rivaj-i-am* which was against daughters obviously referred only to cases of succession in the presence of collaterals, and that, as already explained, is the view which we take of the entry in the *Rivaj-i-am* of Hoshiarpur. It was further laid down that in a case where the succession is disputed by a proprietary body who do not even belong to the tribe of the last deceased owner it was for the proprietary body to show that they had the right of exclusion. Stress was further laid on the fact that the *Wajib ul-arz* contained no entry favourable to the succession of the proprietary body. We do not overlook the fact that in that case instances of the succession of sister's sons were forthcoming, or that the proprietary body were the plaintiffs, but they do not affect the question of *onus* from the point from which we view it.

The weakness of the position of a heterogeneous proprietary body was strikingly brought out again in 63 P. R. 1908 (3), the case of Hindu Rathis of Hoshiarpur, which the Divisional Judge considered. It is true that in that case the claimant was described as the descendant of the daughter's son of the ascendant of last owner, whereas if the last male owner is regarded as the *propositus* the claimant should have been described as the descendant of a grand aunt, but it

(1) 28 P. R. 1904 (*Bishen Singh v. Bhagwan Singh*).

(2) 137 P. R. 1908 (*Nihala v. Rahmatulla*).

(3) 63 P. R. 1908 (*Waryama v. Hira*).

does not appear to us that the decision of that case either was or should have been affected by this mis-description.

The main point insisted upon was that the proprietary body did not form a homogeneous whole, and it is to be noted that in that case as in this the plaintiff was out of possession and apparently had no instances at his command. It was nevertheless considered quite clear that the plaintiff was entitled to exclude the proprietary body *in accordance with the recognised principles of customary law*.

In our opinion the fact that the deceased owner left a personal heir is sufficient in itself to throw the initial *onus* on this heterogeneous body of proprietors, some of whom, it may be noted, are presumably governed by Hindu Law under which a sister's son would succeed as *bandhu*; and as we are unable to hold that that *onus* is discharged we accept the appeal and grant the plaintiffs a decree for the relief claimed with costs throughout.

Appeal accepted.

No. 86

*Before Hon. Mr. Justice Shadi Lal and Hon. Mr.
Justice Leslie Jones.*

KISHAN CHAND—(DEFENDANT)—APPELLANT,
Versus

RAMSUKH DAS—(PLAINTIFF)—BHAWANI DAS—
(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 890 of 1912.

Mortgage—marshalling—Transfer of Property Act, IV of 1882, section 81—suit by first mortgagee without impleading second mortgagee—whether latter's rights are thereby affected and whether a second suit lies to determine the rights of the mortgagees inter se—Civil Procedure Code, Act V of 1908, order 2, rule 2—right of puisne mortgagee to redeem the prior mortgage.

The plaintiff R. D. held a mortgage on 4 houses which had fallen to B. D., the mortgagor, on partition of joint properties—subsequently B. D. mortgaged two of the 4 houses to K. C.—R. D. then instituted a suit for the recovery of his debt without impleading K. C. and obtained a decree, in execution of which he attached the 2 houses. K. C. subsequently objected to the attachment and was successful, with the result that R. D. brought the present suit for a declaration to contest the validity of the order passed in execution.

Held that as the puisne mortgagee K. C. had notice of the previous mortgage to R. D. the doctrine of marshalling did not apply, *vide* section 81 of the Transfer of Property Act.

Held also, that K. C. was a necessary party to R. D.'s suit for recovery of his debt and as he was not impleaded he was entitled to treat the decree

passed behind his back as a nullity so far as he was concerned, and his rights remained unaffected by the decree and the proceedings in execution thereof.

Held also, that neither under order 2, rule 2 of the Code of Civil Procedure nor by any other principle of law was R. D. debarred from bringing another suit with the object of getting the full benefit of his security.

I. L. R. 23 All. 1 (1) and cases cited at p. 3, referred to.

Held further, that K. C.'s right as puisne mortgagee, not being affected by R. D.'s previous suit, was what he could have claimed if he had been a party to that suit, *viz.*, the right to redeem the prior mortgage with view to enforcing his own mortgage and that the right of the two mortgagees *inter se* could be decided in the present suit.

I. L. R. 26 Mad. 537 (2) and *I. L. R. 28 Bom. 153* (3).

Second appeal from the decree of P. D. Agnew, Esquire, Additional Divisional Judge, Lahore, dated the 16th of March 1912.

Rama Nand, for Appellant.

Gokal Chand Narang and Tirath Ram, for Respondents.

The order of the Court was delivered by—

3rd March 1916.

SHADI LAL, J.—The relevant facts of this case are simple and may be stated in a few words. Bhawani Das and his brother, Bishan Das, were co-owners of five houses each having one-half share therein. On the 26th July 1905 the former mortgaged to the plaintiff, Ramsukh Das, his half share in all the five houses, and also another house of which he was the sole owner. In consequence of a partition effected between the brothers on 26th August 1906, four out of the five houses fell to Bhawani Das' share, and it has been found by the Courts below, and the finding has not been contested before us, that the liability for the payment of the mortgage money was transferred to the property which came to the share of the mortgagor on partition.

On the 5th January 1907, Bhawani Das mortgaged two of the four houses to Kishan Chand, defendant-appellant, stating in the deed that they were free of incumbrance. Ramsukh Das, the prior mortgagee, then instituted a suit for the recovery of his debt without impleading Kishan Chand as a party defendant, and on the 7th October 1907 he obtained a decree, in execution of which he attached the two houses. Kishan Chand successfully objected to the attachment with the result that Ramsukh Das filed the present suit which has been decreed by the Courts below. Kishan Chand has preferred a second

(1) (1909) *I. L. R. 23 All. 1* (*Baldeo Singh v. Jaggu Ram*).

(2) (1902) *I. L. R. 26 Mad. 537* (*Goverdhana Doss v. Veerasami Chetti*).

(3) (1903) *I. L. R. 28 Bom. 153* (*Hassanbhai v. Umaji*).

appeal to this Court, which has been argued at great length by the learned pleaders on both sides.

The learned Divisional Judge has found that Kishan Chand had notice of the prior mortgage, and upon this finding it is manifest that the doctrine of marshalling, which finds expression in section 81 of the Transfer of Property Act, cannot be availed of by the subsequent mortgagee. It is beyond dispute that Kishan Chand was interested in the equity of redemption, and there is abundant authority for the proposition that he was a necessary party to the suit brought by Ramsukh Das on the footing of his mortgage and should have been impleaded as a defendant. He is, accordingly, entitled to treat the decree passed behind his back, so far as he is concerned, as a nullity, and his rights remain unaffected by the decree and the proceedings in execution thereof. We are, however, unable to accept the contention that the prior mortgagee is deprived of all remedy against the property mortgaged to Kishan Chand. Neither order 2, rule 2, Civil Procedure Code, nor any other principle of law stands in the way of the plaintiff's bringing a suit with the object of getting the full benefit of the security which he holds, *vide I. L. R. 23 All. 1 (1)* and the cases cited at page 3 of the report.

The common-sense view, which is amply supported by the authorities, is that the rights of both the parties should be viewed in the same way, as if the prior suit had never been instituted. The right of a puisne mortgagee, who was not joined as a party to the suit of the prior mortgagee, is what he could have claimed if he had been a party to the suit, namely, the right to redeem the prior mortgage with a view to enforcing his own mortgage, *vide inter alia, I. L. R. 26 Mad. 537 (2)* and *28 Bom. 153 (3)*. The law requires that the rights of the two mortgagees *inter se* should be determined, and that the puisne mortgagee should be given an opportunity of redeeming the first mortgage. We do not see why this should not be done in the present case, which, though nominally one for a declaration to contest the validity of the order passed in execution, is, in its essence, a suit for the purpose of establishing the priority of the first mortgage as against the second mortgage.

The defendant-appellant has undoubtedly got the right of contesting the execution of the mortgage deed in favour of the plaintiff, and also the passing of consideration thereunder.

(1) (1900) *I. L. R. 23 All. 1* (*Baldeo Singh v. Jaggu Ram*).

(2) (1902) *I. L. R. 26 Mad. 537* (*Goverdhan Doss v. Veerasami Chetti*).

(3) (1903) *I. L. R. 28 Bom. 153* (*Hassanbhai v. Umaji*).

He is entitled to redeem the mortgage upon payment of such sum as may be found due. We find that the lower Courts have omitted to frame an issue on the question, and we must therefore remand under order 41, rule 25, the following issue to the Court of the Subordinate Judge for trial :—

“ Was the mortgage deed, dated 26th July 1905, validly executed by Bhawani Das, and what was the consideration received by him ? ”

The Subordinate Judge is directed to take additional evidence and certify it to this Court together with its finding thereon and reasons therefor. He should also determine the amount, if any, due to the plaintiff on the footing of the mortgage at the date of the institution of the present suit.

Case remanded.

No. 87.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

**HUKAM SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS,**

Versus

**MUSSAMMAT GYAN DEVI AND OTHERS—(DEFENDANTS)
—RESPONDENTS.**

Civil Appeal No. 487 of 1913.

Specific Relief Act, I of 1877, section 42—declaratory suit in respect of a will after death of testator—Court Fees Act, VII of 1870, section 7 in (c)—suit for cancellation of a will.

One D. S. made a will in favour of Mussammat G. D. whom he described as his wife and died shortly afterwards. His brother's sons then brought the present suit for a declaration that the will is null and void and that Mussammat G. D. is not the widow of the deceased.

Held, that as the testator had died the will had become operative and consequently the plaintiffs could not ask for a mere declaration in respect of it but must ask for its cancellation.

109 P. R. 1893 (1), referred to.

Held, that a suit for cancellation of a will comes within section 7 in (c) of the Court Fees Act, and the plaintiffs must pay Court fees according to the amount at which the relief is valued by them in the plaint.

I. L. R. 29 Bom. 207 (2) (dissenting from I. L. R. 5 All. 331 (3)) and 22 W. R. 438 (4), referred to.

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- (1) 109 P. R. 1893 (*Hakim v. Mussammat Mahtab Kour*).
 - (2) (1904) *I. L. R. 29 Bom. 207 (Parvatibai v. Vishtanath Ganesh)*.
 - (3) (1883) *I. L. R. 5 All. 331 (F. B.) (Karam Khan v. Daryai Singh)*.
 - (4) (1874) *22 W. R. 438 (Joy Narain Giree v. Grish Chunder Mytee)*.

*Miscellaneous first appeal from the decree of E. T. Bhan, Esquire,
District Judge, Hoshiarpur, dated the 1st March 1913.*

Umar Bakhsh, for Appellants.

Rajindra Misra, for Respondents.

The judgment of the Court was delivered by—

LESLIE JONES, J.—In 1912 Dasondha Singh, who had a 6th March 1916. wife named Mussammat Gyan Devi, executed a will in favour of another lady, Mussammat Gur Devi whom he described as his wife.

Dasondha Singh died shortly after the execution of the will, and his brother's sons have sued for a declaration that the will is null and void and that Mussammat Gur Devi is not the widow of the deceased.

On these prayers the plaintiffs paid a Court-fee stamp of Rs. 10 only, but valued the suit at Rs. 10,491-8-0 for the purposes of jurisdiction.

The District Judge held that the plaintiffs were asking for consequential relief, and gave them time to pay Court fees on Rs. 10,491-8 0.

As the plaintiffs failed to comply, he rejected their plaint.

The plaintiffs have now appealed to this Court.

Having carefully examined the wording of the plaint we are unable to agree with the District Judge that the plaintiffs have actually asked for consequential relief, but on the other hand we think that they were bound to ask for such relief, in the shape of the cancellation of the document (concerning which they have asked for a declaration only), the reason being that owing to the death of Dasondha Singh the will in dispute has lost its ambulatory character and has become operative. If Dasondha Singh were still alive, in that case all that the plaintiffs could ask for as regards the will would be a declaration, but since he is dead they must go further and get the will cancelled before they can avoid it. For this view 109 P. R. of 1893 (1) is an authority, although the case actually dealt with in that judgment was one in which the suit was for a declaration, during their life-time, against a will made by widows.

There is ample authority for the position that if the suit is for cancellation of a document, it is one falling under section 7, paragraph 4, clause (c) of the Court-fees Act and must be valued accordingly, *vide I. L. R. 29 Bom. 207 (2)*, (in which

(1) 109 P. R. 1893 (*Hakim v. Mussammat Mahtab Kour*).

(2) (1904) I. L. R. 29 Bom. 207 (*Parvatibai v. Vishvanath Ganesh*).

I. L. R. 5 All. 381 (1) was dissented from) and 22 Sutherland's Weekly Reporter 438 (2).

But under that section the plaintiffs are entitled to state the amount at which they value the relief sought, and we are of the opinion that they must be given an opportunity of so doing, and of amending their plaint so as to sue directly for the cancellation of the will. The claim for a declaration that Mussammatt Gur Devi is not the widow of Dasondha Singh is a claim for distinct relief and must be stamped accordingly.

With these remarks we accept the appeal and remand the suit to the Senior Subordinate Judge under order 41, rule 23, with the direction that the plaintiffs be accorded a reasonable opportunity of amending their plaint and re-valuing their relief. We purposely say nothing on the question of the jurisdictional value of the suit.

Having regard to the circumstances, we direct that costs be costs in the case.

Appeal accepted.

No. 88.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

ASA RAM—(PLAINTIFF)—APPELLANT,

Versus

BUDHU MAL AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 3438 of 1915.

Punjab Courts Act, 1914, sections 39 and 41—second appeal on question whether there was sufficient ground for extending period of limitation in Lower Appellate Court—jurisdiction—Indian Limitation Act IX of 1908, section 5 and article 152—limitation for appeal to District Court.

Plaintiff's suit was dismissed by a Munsiff, 1st class, on 8th June 1914. Plaintiff filed an appeal in the Court of the District Judge on the 1st August 1914, on which date the new Punjab Courts Act of 1914 came into force vide notification of the Local Government dated 15th July 1914. The District Judge held that as the appeal to his Court had been presented more than 30 days after date of decree of the first Court, the appeal was barred by time and no indulgence could be allowed under the provisions of section 5 of the Limitation Act. The plaintiff then preferred a second appeal to the Chief Court.

Held, that the question as to whether there was sufficient cause within the meaning of section 5 of the Limitation Act for being late with an appeal cannot be gone into on second appeal.

I. L. R. 25 All. 71 (3) and *I. L. R.* 26 All. 327 (4), referred to.

- (1) (1883) *I. L. R.* 5 All. 331 (F. B.) (*Karam Khan v. Daryai Singh*).
- (2) (1874) 22 W. R. 438 (*Joy Narain Girc v. Grish Chunder Mytee*).
- (3) (1902) *I. L. R.* 25 All. 71 (*Tulsa Kuwar v. Gajraj Singh*).
- (4) (1904) *I. L. R.* 26 All. 327 (*Hamid Ali v. Gaya Din*).

Held also, that as the new Punjab Courts Act of 1914 had been passed in January 1914, assented to by the Viceroy in April, published in the *Punjab Government Gazette* in May and brought into force on 1st August under a notification of the Local Government dated 15th July, the Act must be held to be retrospective in its operation and that consequently the District Judge was right in holding that the appeal to his Court was barred by time.

13 *Indian Cases* 264 (*Sind*) (1), 5 *Indian Cases* 420 (*Mad.*) (2), referred to, also 30 *P. R.* 1915 (3).

Held further, that the appeal to the District Judge was one under the Code of Civil Procedure and that article 152 of the Limitation Act was consequently applicable to it.

Second appeal from the decree of Major B. O. Roe, District Judge, Ambala, dated the 28th August 1915.

Raghu Nath Rai, for Appellant.

Nand Lal, for Respondents

The judgment of the learned Chief Judge was as follows :—

SIR DONALD JOHNSTONE, C. J.—The decree of the first Court 6th March 1916. in this case was given on the 8th June 1914 by the Munsif, 1st class, Ambala District. Under the law then in force the plaintiff whose suit had been dismissed had sixty days within which to appeal to the Divisional Judge, Ambala. On the 15th January 1914 the new Punjab Courts Act had received the assent of the Lieutenant-Governor and on the 27th April 1914 that of His Excellency the Viceroy and Governor-General; and the Governor-General's assent was published in the *Punjab Government Gazette* of the 22nd May 1914. This Act, by notification of the Punjab Government, was brought into force on the 1st August, 1914. Had there been no new legislation the plaintiff would have had till the 8th August 1914 to file his appeal in the Court of the Divisional Judge, but on 1st August 1914 that Court ceased to exist and 30 *P. R.* 1915 (3) is authority for the proposition that the Court of the District Judge created by the Punjab Courts Act aforesaid is not the same tribunal as the old Divisional Court, but an entirely new tribunal. An appeal was filed in the Court of the District Judge, Ambala, on the 1st August 1914, and first an *ex-parte* decree was passed which was, however, set aside.

The learned District Judge then considered the question of limitation. He held that, as under the new Courts Act all appeals to the Court of the District Judge must be preferred within thirty days and as the new Act had come into force when this appeal was presented, the appeal was barred by

(1) (1910) 13 *Indian Cases* 264 (*Sind*) (*Hemandas v. Chellaram*).

(2) (1910) 5 *Indian Cases* 420 (*Mad.*) (*Arayil Kali v. Pelloppakkara*).

(3) 30 *P. R.* 1915 (*Mengens v. Sulej Flour Mills*).

limitation. The District Judge's view was that, if the new Act had been one that simply reduced the limitation for appeal to the Divisional Judge from sixty days to thirty days, then, perhaps, the appeal might be within time, but that the Court of the District Judge not being the successor of the old Divisional Court but a new Court altogether, therefore there could be no question of sixty days' limitation. It was apparently argued before the District Judge further that the Legislature could not have intended to take people by surprise by curtailing the time allowed for appeal, and this argument the District Judge met by pointing out that the Punjab Government Notification aforesaid gave due warning to the public of the future coming into force of the Act. Lastly, the learned District Judge declined to allow any indulgence under the provisions of section 5 of the Limitation Act, holding that mere ignorance of law was no sufficient reason for extending the time prescribed by law.

The plaintiff now comes up here with this second appeal, and Mr. Nand Lal on behalf of the opposite party raises two preliminary objections, the first of which is with reference to the error in the appeal-petition, whereby respondent 2 is put down as Raghunath Das, although Raghunath Das was already dead before the appeal was instituted. I have no hesitation in overruling this objection, because the representatives of Raghunath Das are already on the record. The error was simply a clerical one and has caused no prejudice to any party.

The second objection raised is more important. It is argued that no second appeal lies as to the exercise of discretion by a lower Court under section 5 of the Limitation Act. There are two Allahabad rulings directly in point—*I. L. R. 25 All. 71 (1)* and *I. L. R. 26 All. 327 (2)*. In my opinion this objection is sound, and therefore I cannot allow the appellant to argue that the lower Court wrongly exercised its discretion under section 5 aforesaid. Indeed if the matter be considered, authority is hardly required. When a Court has decided that a suit on appeal is strictly speaking barred by limitation, and the appellant proposes to show that he had "sufficient cause" for being late with his appeal, that "sufficient cause" must always be a question of fact; and of course no second appeal lies on a question of fact.

As to this the learned counsel for the appellant makes a last effort to show that a second appeal lies by urging that

(1) (1902) *I. L. R. 25 All. 71* (*Tulsa Kunwar v. Gajraj Singh*.)

(2) (1904) *I. L. R. 26 All. 327* (*Hamid Ali v. Gaya Din*).

up to the date on which his client filed his appeal in the Lower Appellate Court (1st August 1914) no new law existed as yet and therefore the District Judge was wrong in talking about "ignorance of law." This argument seems to me to be based on wrong premises : the law certainly *existed* before 1st August 1914, though it did not come into operation until that date.

I turn now to the question whether, apart from section 5 of the Indian Limitation Act, the appeal to the District Judge was in time or not. The question is something like the one decided in 30 *P. R.* 1915 (1), though in that case there was no question of limitation.

From that ruling I take the three following *dicta* as helping in the present case : (1) that Acts of the Legislature which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of the parties to a suit; (2) that a right of appeal which has accrued is such a vested right; and (3) that the tribunal competent to dispose of appeals instituted before a new Act came into force but still pending when it came into force, is the tribunal, which would have been competent to dispose of them, if the appeals had been instituted after the said new Act came into force. Now if the facts and dates given above are seen, I understand that, according to this ruling, though the Court of the District Judge is not successor of the Divisional Court, yet the appeal would lie to the District Judge from the decision of the Munsif in the present case. If the present Punjab Courts Act had been in existence before the 8th June 1914 when the Munsif passed his decree, the appeal certainly would have lain to the District Judge. But it was not decided in 30 *P. R.* 1915 (1) whether, while such appeals should be heard under the new Punjab Courts Act by (in a case like the present) the District Judge, the limitation for those appeals should not be that under the new law, *i.e.*, 30 days, but that under the old law, *i.e.*, 60 days.

A number of cases have been quoted to me—13 *Indian Cases* 264 (*Sind*) (2) ; 5 *Indian Cases* 420 (*Mad.*) (3) and so forth to the effect that where the operation of an Act is postponed, that Act is retrospective, the public being warned by the postponement in good time of the change of the law. In the present case the doctrine laid down in those cases is very difficult either to apply or to reject, for, while no doubt the Act itself was passed by the Local Council in January 1914

(1) 30 *P. R.* 1915 (*Meugens v. Suttlej Flour Mills*).

(2) (1910, 13 *Indian Cases* 264 (*Sind*) (*Hemandas v. Chellaram*).

(3) (1910) 5 *Indian Cases* 420 (*Mad.*) (*Arayil Kali v. Pellappakkara*).

and approved by His Excellency the Viceroy on the 27th April 1914, and was published in the Gazette on the 22nd May 1914, the Local Government (under section 1 (3) of the Act) did not notify until the 15th July 1914 that 1st August was to be the date on which the Act should come into force. The question is whether this 16 days' notice of the coming into force of an Act allows us to infer that the Act was to be retrospective. In my opinion it does, if all the circumstances be taken into account. No one was really taken by surprise. The Act had been passed in January, assented to by the Viceroy and Governor-General in April and published in the Gazette in May all before the decree appealed against had even been passed and appellant must or should have known that the limitation had been cut down from 60 to 30 days by an enactment which might any day come into force. Even apart from the postponement from 15th July to 1st August he should in common prudence have filed his appeal while it was still safe to do so; and when the notification of 15th July gave him 16 days' grace, he should certainly have come forward by 31st July at latest.

The first and second grounds of appeal are a mere quibble the Act had come into force when the appeal was filed. The first additional ground of appeal is unsound. Article 152 fully applies: the appeal is an appeal "under" the Civil Procedure Code, though the Courts Act is the Act which determines where the appeal shall go. The contention raised would make article 152 a dead letter. The next ground is also unsound: section 4, General Clauses Act (Punjab) does not imply that the length of time a party has to appeal in is a right saved, where there is reason to suppose, as here, that the new Act was meant to be retrospective.

For these reasons I must dismiss this appeal but in all the circumstances I think parties should bear their own costs.

Appeal dismissed.

No. 89.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

DIWAN SINGH—(PLAINTIFF)—APPELLANT,

Versus

**MUSSAMMAT PARO AND OTHERS—(DEFENDANTS)—
RESPONDENTS.**

Civil Appeal No. 1307 of 1912.

Custom—Alienation—Hindu Kalals of Mauza Alawalpur, District Jullundur—gift to daughter in presence of a brother—Hindu Law.

Held, that there was no presumption that Hindu Kalals of *Mauza Alawalpur* who had carried on non-agricultural occupations for a long time and were not wholly dependent for their livelihood on agriculture were, in matters of alienation of landed property, governed by agricultural custom, and that no such custom had been proved in this case.

87 *P. R.* 1907 (1), referred to.

127 *P. L. R.* 1906 (2) and Civil Appeal No. 371 of 1902 (unpublished) followed in 81 *P. R.* 1912 (3), distinguished.

Further appeal from the decree of L. H. Leslie Jones, Esquire, Divisional Judge, Jullundur, dated the 7th August 1911.

Govind Das, for Appellant.

Kanwar Narain and Badri Das, for Respondents.

The judgment of the Chief Court was delivered by —

SHAH DIN, J.—The parties are Hindu Kalals of village *7th March, 1916.*
Alawalpur in the *Jullundur District*. In 1908 *Sher Singh*, a brother of the plaintiff *Diwan Singh*, made an oral gift of the land in dispute to his daughter *Mussammatt Paro* and her son *Amar Nath*, and mutation was sanctioned in favour of the donees on the strength of the gift in August 1908. In June 1910 *Diwan Singh* brought the present suit for a declaration that the gift in question shall not affect his reversionary rights after the death of the donor *Sher Singh*, and he impleaded as defendants in the suit both the donor and the donees and the descendants of his brother *Dhian Singh* who did not join in the suit. One of the pleas urged by the donees was that the parties were not governed by agricultural custom, and that the plaintiff had no power to question the validity of the gift made by *Sher Singh*; and the first issue drawn in the case was whether or not the parties were governed by custom in matters of alienation. Both the Courts below have concurred in holding that the plaintiff has failed to prove that agricultural custom governs the parties, and that *Sher Singh* was incompetent to make the gift in dispute in favour of his daughter and daughter's son; and upon this finding the plaintiff's suit has been dismissed.

The plaintiff has preferred a further appeal to this Court, and his learned pleader has contended that the lower Courts have erred in holding that the parties are not governed by custom and that the plaintiff has therefore no *locus standi* to challenge the gift of 1908. We have heard the learned

(1) 87 *F. R.* 1907 (*Attar Singh v. Sant Singh*).

(2) 127 *P. L. R.* 1906 (*Dev Chand v. Gurcharn Singh*),

(3) 81 *P. R.* 1912 (*Tulsi Ram v. Ram Chandar*),

pleader at some length in support of the appeal, but we have not considered it necessary to call upon the respondent's pleader, as we are of opinion that the concurrent decision of the Courts below is correct and must be maintained.

We find that on the 24th August 1910 the appellant made a statement in the Munsif's Court which has an important bearing upon the question before us. He said: there are 20 or 25 families of Kalals at Alawalpur, and out of these only two or four families own land but only two or three of them actually cultivate the land they hold. Diwan Chand who was produced as a witness by the plaintiff himself, stated in the Munsif's Court that no Kalal cultivated land in village Alawalpur, and this seems to be correct, as not a single instance of a Kalal cultivating land in this village has been cited before us by the appellant's pleader. It is also proved that Kahan Singh, father of the appellant, was in Government service; that Sher Singh, donor, was a Reader in a Munsif's Court; and that the appellant himself served in the Police Department. Dhian Singh, another brother of the appellant, was also in service; and it would seem that Indar Singh and Nathu, sons of Dhian Singh, carried on non-agricultural occupations.

In view of these facts, the learned Divisional Judge is right in holding that the family of the parties cannot be held to be an agricultural family. It is true that Ram Singh, grandfather of Kahan Singh, settled in the village along with the original founder thereof, and that ever since that time the family has been holding land therein: but that fact is insufficient of itself to show that the family is a family of agriculturists; and in fact, it has been definitely proved in the present case that the members of this family from Kahan Singh downwards have depended for their livelihood on non-agricultural pursuits. Then, there is the important fact brought out in the statement of the appellant himself that the Kalals constitute a very small portion of the population of Alawalpur (which at the census of 1901 consisted of 4,432 souls), and that only two or three Kalal families own agricultural land.

There can, therefore, be no initial presumption in this case that the parties follow agricultural custom and not their personal law, and that Sher Singh had no power to gift his land to a daughter and her son. In support of his position that Sher Singh was governed by custom under which his power of disposition was restricted, the appellant's pleader has strongly relied upon the case of *Devi Chand v. Gurcharn*

Singh and others which related to this very family and which was eventually decided by this Court in 1906 (*vide* the judgment of this Court dated 16th March 1906 in further appeal No. 265 of 1903, reported as 127 *P. L. R.* 1906 (1).) Indar Singh, a nephew of the present appellant, had sold some of his land in 1894, and his son Devi Chand brought a suit to contest the validity of the sale after a suit for pre-emption had been successfully brought in respect of that sale by the appellant. One of the questions raised in that case was whether or not the parties were governed by agricultural custom, and it was decided both by the Divisional Judge and by this Court that they were so governed. The appellant's pleader relies upon this judicial precedent as showing that custom governs the parties in this case also, and that consequently Sher Singh's power of alienation in respect of his ancestral property was restricted. But, as pointed out by the learned Divisional Judge in the present case, the finding recorded by the Divisional Judge in the previous case was based mainly on a presumption arising from the entries in the settlement records showing that the family had owned land for some generations, and not upon any facts, proved or ascertained, bearing upon the question as to whether the family followed agricultural pursuits or not. This Court did not discuss the point in any detail, but simply contented itself with remarking that "the Divisional Judge had given good grounds for holding that this family was agriculturist."

The facts which have come to light in the present case certainly do not lend support to the view that the family is an agricultural family; and as pointed out by the learned Divisional Judge, the decision of this Court reported as 87 *P. R.* 1907 (2) is very much in point. Reliance was also placed by the appellant's pleader upon an unpublished decision of this Court in Civil Appeal No. 371 of 1902 which has recently been followed in 81 *P. R.* 1912 (3). As observed by the learned Judges in 87 *P. R.* 1907 (2) and also in the case last cited, the Kalalhatti case was a case with its own peculiar facts, inasmuch as it related to a village in the Ambala District inhabited by a compact community of Kalals who had founded the village, and had owned agricultural land for generations and had lived mainly by agriculture. The facts of the present case are wholly dissimilar to those

(1) 127 *P. L. R.* 1906 (*Devi Chand v. Gurcharn Singh*).

(2) 87 *P. R.* 1907 (*Attar Singh v. Sant Singh*).

(3) 81 *P. R.* 1912 (*Tulsi Ram v. Ram Chandar*).

of the Kalalhatti case, and the decision in that case has therefore no bearing whatever upon the present litigation.

We agree with the learned Divisional Judge in holding that in this case it was for the appellant to show that his family was governed by agricultural custom under which Sher Singh was incompetent to make the gift in dispute, and that he has wholly failed to discharge this *onus*. We accordingly maintain the decree of the Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

No. 90.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

AMIR DIN AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MUSSAMMAT SAHIBAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2278 of 1913.

Custom—Alienation— Khojas of Chiniot, district Jhang—gift to wife—challenged by collaterals.

Held, that the plaintiffs, collaterals, on whom the *onus* lay, had failed to prove the existence of a custom among Khojas of the town of Chiniot restricting the power of disposition of a male proprietor.

First appeal from the decree of Rai Bahadur Lala Sansar Chand, District Judge, Jhang, dated the 31st July 1913.

Mehta Bahadur Chand, for Appellants.

Fazl-i-Hussain, for Respondents.

The judgment of the Court was delivered by :—

7th March 1916.

SHADI LAL, J.—This appeal arises out of an action brought by the collaterals of one Allah Jowaya, a Khoja of the town of Chiniot in the district of Jhang, to contest the validity of a deed dated the 27th May 1908, by which he settled some landed and house properties upon his wife, Mussammat Sahiban. The District Judge has held that part of the landed property is non-ancestral, the rest being ancestral; and that the plaintiffs have failed to establish a custom restricting Allah Jowaya's power of alienation. He has consequently dismissed the suit.

Upon this appeal preferred by the plaintiffs the learned counsel on both sides are agreed that the question whether Mussammat Sahiban got an absolute estate in virtue of the

alienation in her favour does not arise in the case and need not be determined ; and in view of our decision as regards the alleged custom we consider it unnecessary to pronounce any opinion upon the correctness or otherwise of the finding relating to the ancestral nature of the property.

Confining the case, then, to the simple issue relating to the power of alienation, we observe that the alienor was a resident of a town, did not depend upon agriculture for his livelihood, and belonged to a tribe, the members of which are, it is well known, generally traders or merchants. The *onus*, therefore, lies heavily upon the plaintiffs to prove a custom placing restriction upon the power of disposition of a Khoja ; and after hearing Mr. Bahadur Chand we have no hesitation in holding that they have hopelessly failed to discharge it. In support of the alleged custom not a single instance, judicial or otherwise, has been adduced ; and the sole evidence to which our attention has been drawn is the oral testimony of two of plaintiffs' witnesses, namely, Ilahi Bakhsh and Walidad, who make bald statements to the effect that a sonless Khoja is not entitled to give his property to his widow or a stranger. They admit that there is no instance to corroborate their evidence, and the former states in respect of one Mir Muhammad (a Khoja) that he could give his property to any one by means of a gift. Walidad, when cross-examined in regard to his own power of disposition, replied that he was competent to gift or sell his property to any one. This is all the evidence upon which the plaintiffs base their case, and it is obvious that no Court of Justice can, upon a slender and unsatisfactory material of this nature, record a finding in their favour. The respondents have adduced documentary and oral evidence showing that the Khojas have been making wills in favour of their wives and other relatives, but there is no necessity to refer to it or to the criticisms advanced against it by the learned pleader for the appellants.

Suffice it to say, that the evidence adduced by the appellants is wholly insufficient to sustain a finding in their favour, and that the defendants were not, in the circumstances, called upon to produce any evidence in rebuttal.

We accordingly affirm the decree of the District Judge and dismiss the appeal with costs

Appeal dismissed.

No 91.

*Before Hon. Mr. Justice Cheris and Hon. Mr. Justice
LeRossignol.*

MILAWA RAM—(DEFENDANT)—PETITIONER,

Versus

PEOPLE'S BANK OF INDIA—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 1678 of 1912.

Indian Companies Act, VI of 1882, section 136—leave of Court to proceed with revision proceedings against decree in favour of a plaintiff Bank which went into liquidation during pendency of the revision.

The People's Bank of India "Limited" sued the present petitioner for a certain sum due by him and obtained a decree which was upheld on appeal. Petitioner then filed a revision in the Chief Court and pending termination of his petition the Bank became insolvent and an order was passed by the District Judge for its winding up through the Court.

The question then arose whether petitioner could proceed with his revision without the sanction of the Court under section 136 of the Indian Companies Act. It was urged for petitioner that it was not he, but the Bank, who was plaintiff in the suit and that consequently he was not proceeding against the Company.

Held, that the revision proceeding against the decree obtained by the Company was a proceeding "against the Company" within the meaning of section 136 of the Companies Act, and could consequently not be proceeded with without the leave of the Court.

Petition for revision of the decree of P. L. Barker, Esquire, Divisional Judge, Gujranwala Division, at Lahore, dated the 27th August 1912.

Kanwar Narain, for Petitioner.

Herbert and Madan Gopal, for Respondent.

The order of the Court was delivered by—

LEROSSIGNOL, J.—Two points were referred to this Bench by the Single Bench.

Of these, that bearing on the necessity for the official liquidator to obtain the leave of the District Judge to defend the present revision is decided by the production of the necessary permission.

The remaining point is whether this revision cannot proceed unless and until the petitioner obtains the sanction of the District Judge, whether in fact this revision is a proceeding against the Company in liquidation within the meaning of section 136 of Act VI of 1882.

For the petitioner it is contended that a revision is a mere continuation of a suit, that the suit was brought not against

11th Nov. 1915.

the Company but by the Company against petitioner, and therefore section 136 of the Act does not apply.

We are unable to accept this contention; the present proceeding is a revision, but a revision is no essential or inevitable portion of a suit, and we can find no authority for holding that a suit and a revision are synonymous terms.

In this case the suit was by the Company; the revision however is against the Company and we held that it is a proceeding against the Company within the meaning of the section.

It is a proceeding intended to wrest from the Company the decree obtained by it in the Courts below, a decree which but for the present revision would establish the Company's title in the property in dispute. The present revision is a proceeding against the Company to defeat that title.

The object of section 136 is to prevent all litigation against the Company except with the consent of the District Judge, and all proceedings in which the Company is either a defendant or a respondent are proceedings against the Company.

Our finding is that before this revision can proceed, the petitioner must obtain the sanction of the District Judge.

With this finding, we return the case to the Single Bench. The costs of this hearing shall be allotted as that Bench may direct.

No. 92.

Before Hon. Mr. Justice Rattigan.

HARDHAN—(PLAINTIFF)—APPELLANT,

Versus

**MAM CHAND AND OTHERS—(DEFENDANTS)—
RESPONDENTS.**

Civil Appeal No. 1402 of 1915.

Indian Limitation Act, IX of 1908, section 5—discretionary power of Appellate Court to grant or refuse extension of time—whether interfered with on second appeal.

Held, that where a lower Appellate Court has considered the matter carefully and come to the conclusion that no case has been made out for extending the period of limitation under section 5 of the Limitation Act, the Chief Court will not interfere with its order in second appeal.

I. L. R. 26 All. 327 (1) and I. L. R. 25 Mad. 166 (2), referred to.

Second appeal from the decree of Khan Bahadur Maulvi Inam Ali, District Judge, Hissar, dated the 12th March 1915.

Tek Chand and Nanak Chand Pandit, for Appellant.

Oertel and Lakshami Narain, for Respondents.

(1) (1904) *I. L. R. 26 All. 327 (Hamid Ali v. Gayadin).*

(2) (1901) *I. L. R. 25 Mad. 166 (Kichilappa Naickar v. Ramannujam Pillai).*

15th March 1916.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—Plaintiff's appeal to the lower Appellate Court has been dismissed as barred by limitation. His suit was dismissed with costs by order of the Subordinate Judge, dated the 31st of August 1914 and an appeal was presented to the District Judge on the 4th of November 1914, *i. e.* 64 days after the date of the decree.

Under article 152 of the Limitation Act the appeal to the District Judge should have been preferred within 30 days of the date of a decree, but it was urged before the District Judge that an extension of time should be allowed under section 5 of the Limitation Act, inasmuch as the appellant and his legal advisers had made a *bona fide* mistake in supposing that the law of limitation laid down in section 44 of the previous Punjab Courts Act had not been affected by the enactment of the Punjab Courts Act, III of 1914, now in force. Inasmuch as seven days were occupied in obtaining copies of the judgment and decree of the Subordinate Judge the appeal would have been in time had it been presented to the Divisional Judge under the former Punjab Courts Act, but under the new Act it is obviously barred unless the Court is prepared to hold that there was "sufficient cause" for the delay. The District Judge has considered the matter carefully and has come to the conclusion that no case was made out for extending the period of limitation.

I am asked on second appeal to interfere with the exercise of the learned Judge's discretion because there was considerable doubt in the minds of legal practitioners as to whether the old law of limitation had been abolished or not. I cannot agree that this is any reason why I should interfere with the order of the District Judge. It is impossible to say that he has exercised his discretion arbitrarily or unreasonably and it was for him to decide whether he would grant the extension of time or not (see *I. L. R.* 26 *All.* 327 (1) and *I. L. R.* 25 *Mad.* 166) (2).

It is immaterial what view I should myself have taken had I been in the position of the District Judge, for it is only in those cases where it can be held that he has exercised his discretion unreasonably or without proper consideration of the facts before him that this Court is justified in interfering.

I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) (1904) *I. L. R.* 26 *All.* 327 (*Hamid Ali v. Gayadin*).

(2) (1901) *I. L. R.* 25 *Mad.* 166 (*Kichilappa Naickar v. Ramahnujam Pillai*).

No 93.

Before Hon. Mr. Justice Rattigan.

BHAG SINGH—(PLAINTIFF)—APPELLANT,

*Versus*LABH SINGH AND OTHERS —(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No 2884 of 1915.

Civil Procedure Code, Act V of 1908, sections 20 (c) and 21—jurisdiction—suit for damages for breach of betrothal—where tried by wrong Court—how dealt with by Appellate Court.

Plaintiff sued at Tarn Taran to recover damages for breach of a betrothal contract and obtained a decree. The defendants appealed to the District Judge who set aside the decree on the ground that the first Court had not jurisdiction as the defendants, the parents of the girl, resided in the Sialkot district.

Held, that as the contract of betrothal was made at Tarn Taran the cause of action arose in part at Tarn Taran, *vide* section 20 (c) of the Code of Civil Procedure, 1908, and the Court there had consequently jurisdiction to entertain the suit.

57 P. R. 1874 (1) and 147 P. R. 1882 (2), distinguished, as applicable only to section 17 of the Code of 1877 and not to section 17 of the Code of 1882 or section 20 of the present Code.

Held also, that even if the Munsiff of Tarn Taran had no jurisdiction to entertain the suit his judgment should not have been set aside, unless the District Judge was satisfied that there had been a failure of justice by reason of the suit being instituted at the wrong place, *vide* section 21 of the Code.

Second appeal from the decree of S. S. Harris, Esquire, District Judge, Amritsar, dated the 10th July 1915

Mehr Chand, for Appellant.

Charat Singh, for Respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—Plaintiff's suit to recover a sum of Rs 500 as damages for breach of a betrothal contract was decreed in part by the *Munsif*, 1st class, Tarn Taran. Defendants appealed to the District Judge and the first ground urged on their behalf was that the *Munsif* at Tarn Taran had no jurisdiction to hear the suit. The learned Judge relying on No 57 P. R. 1874 (1) and No. 147 P. R. 1882 (2) has upheld this objection holding that the suit was cognizable only by the Court of the Sialkot district where the parents of the girl reside. The learned

16th March 1916.

(1) 57 P. R. 1874 (*Lorinda Mal v. Seta Singh*).(2) 147 P. R. 1882 (*Buta v. Jagga*).

Judge accordingly set aside the decree of the lower Court and returned the plaint to the plaintiff to be presented to the Court competent to hear and decide the case.

Plaintiff has appealed to this Court and after hearing the learned pleaders who appeared before me for their respective clients, I must accept the appeal and remand the case for further consideration to the District Judge. The authorities cited by him were decided at a time when the Civil Procedure Code of 1877 was in force, and at that time the words "cause of action" as used in section 17 of that Code were construed to mean merely the infringement of the right. After the decision of the two cases cited Explanation 3 was added to section 17 of the Civil Procedure Code of 1882 and under section 20 (c) of the present Code a Court has jurisdiction when the cause of action wholly or in part arises within the local limits of its jurisdiction.

It is contended on behalf of plaintiff and was so found by the *Munsif* that the contract of betrothal was made at Tarn Taran and if such was the case the Court of the *Munsif* at Tarn Taran would have jurisdiction to hear and decide the suit. Moreover, even if the *Munsif* at Tarn Taran had no jurisdiction to entertain the suit, his judgment should not have been set aside unless the District Judge was satisfied that there had been a failure of justice by reason of the suit being instituted at the wrong place (see section 21, Civil Procedure Code).

I accordingly set aside the order of the District Judge and direct him to reconsider the appeal before him in the light of the foregoing remarks. The costs in this Court will abide the event.

Appeal accepted.

No. 94.

Before Hon. Mr. Justice Rattigan.

MUSSAMMAT AISHAN—(DEFENDANT)—APPELLANT,

Versus

MUHAMMAD DIN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 2887 of 1915.

Civil Procedure Code, Act V of 1908, section 11, explanation 4—res judicata—matter which ought to have been made ground of attack in a previous suit—suit to include whole claim—conflict of authority, as to whether a plaintiff in a suit for possession must put forward all his titles or not, pointed out.

One H., a Gujar, gifted his estate to his 2 daughters, Mussammat A. and Mussammat S. B., half and half and had mutation effected in their respective

names. Mussammat S. B. died in 1907 and H. then took possession of her share and mutation was effected in his favour. H. died some three or four years later and on his death his widow applied to have this land mutated in favour of her other daughter Mussammat A. Upon this the present plaintiff, the husband of the deceased daughter Mussammat S. B., and other collaterals of H. sued the widow and Mussammat A. for a declaration that the application by the widow which they described as a gift to Mussammat A. should not affect their reversionary rights on the death of the widow. This suit failed on the ground that Mussammat A. was the *khanadamad* of her late father. Thereon the plaintiff instituted the present suit in which he claims to recover possession from Mussammat A. on the ground that after the death of Mussammat S. B., his late wife, he was entitled to succeed to the property given to his wife. It was contended by defendant that the present suit is barred under section 11 and order 2, rule 2 of the Code of Civil Procedure.

Held, that as in the previous suit plaintiff was only one of several joint plaintiffs who were seeking merely a declaratory decree of their alleged reversionary rights and were not claiming possession and as in that suit the present claim based upon plaintiff's alleged exclusive title to present possession of the land would have been inconsistent with the claim set up by the plaintiffs in the previous suit, neither section 11, explanation 4, or order 2, rule 2 were applicable to the present suit.

6 P. R. 1886 (1) and 68 P. R. 1915 (2), referred to.

The conflict of authority, as to whether in a suit to recover possession of property a plaintiff is bound to support the claim made by him by bringing forward every title which he has, or claims to have, in respect of such property, pointed out.

Authorities cited for the proposition that he must put forward all his title:—

I. L. R. 2 Cal. 152 (3), I. L. R. 3 Cal. 23 (4), I. L. R. 4 All. 21 (5), I. L. R. 3 Bom. 137 (6), I. L. R. 25 Bom. 189 (7), I. L. R. 31 Mad. 385 (8) and 146 P. R. 1890 (9).

Contra: I. L. R. 2 Cal. 152 (3) per Garth, C. J., 8 Bom. II. C. R. 89 (10), I. L. R. 2 Mad. 352 (11), I. L. R. 4 Mad. 308 (12), I. L. R. 7 Mad. 264 (13), I. L. R. 26 Mad. 760 (14), I. L. R. 27 Mad. 102 (104) (15),

(1) 6 P. R. 1886 (*Muhammad Din v. Rahim Gul*).

(2) 68 P. R. 1915 (*Kura v. Madho*).

(3) (1876) *I. L. R. 2 Cal. 152 (F. B.) (Densbundhoo Chowdhry v. Kristomonee Dossee)*.

(4) (1877) *I. L. R. 3 Cal. 23 (Bheeka Lall v. Bhuggoo Lall)*.

(5) (1881) *I. L. R. 4 All. 21 (Sultan Ahmad v. Maula Bakhsh)*.

(6) (1878) *I. L. R. 3 Bom. 137 (Haji Hasam v. Ibrahim)*.

(7) (1900) *I. L. R. 25 Bom. 189 (Guddappa v. Tirkappa)*.

(8) (1908) *I. L. R. 31 Mad. 385 (Masilamanian Pillai v. Thiruvengadam Pillai)*.

(9) 146 P. R. 1890 (*Pala Mal v. Maya*).

(10) (1871) 8 B. m. II. C. R. 89 (*Bhisto Shankar v. Ram Chandrarav*).

(11) (1879) *I. L. R. 2 Mad. 352 (Sadaya Pillai v. Chinni)*.

(12) 1881 *I. L. R. 4 Mad. 308 (Thyila v. Thyila)*.

(13) (1883) *I. L. R. 7 Mad. 264 (Allunni v. Kunjusha)*.

(14) (1902) *I. L. R. 26 Mad. 760 (Ramaswami Ayyar v. Vythinatha Ayyar)*.

(15) (1903) *I. L. R. 27 Mad. 102 (Veera Pillai v. Muthu Kumara)*.

I. L. R. 22 Mad. 323 (1), I. L. R. 2 All. 582 (2), I. L. R. 6 All. 358 (3) and 1 All. L. J. 228 (4).

Second appeal from the decree of N. H. Prenter, Esquire, District Judge, Jhelum, dated the 18th August 1915.

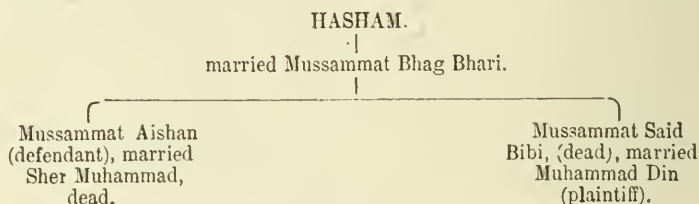
Devi Dial, for Appellant,

Respondent, in person.

The judgment of the learned Judge was as follows :—

2nd March 1916.

RATTIGAN, J.—The parties are Muhammadan Gujars of the Gujrat District and the following table will help to explain the facts :—



It has been found in this case and was held to be established in No. 40 *P. R.* 1912 (5), that among Gujars of the Gujrat District the custom of *khanadamadi* is very prevalent, and it is not surprising therefore to find that Hasham during his life-time made a gift of his estate, half to his daughter Mussammat Aishan and half to his daughter Mussammat Said Bibi and had mutation effected in their respective names.

Mussammat Said Bibi died about 1907 and on her death the land given to her was taken possession of by Hasham and mutation was effected in his favour, Muhammad Din present plaintiff apparently acquiescing in the proceedings. Hasham died some three years before institution of the present suit and on his death his widow, Mussammat Bhag Bhari, applied to the Revenue authorities to effect mutation of the land left by him (*i. e.* the half of the estate that had been originally given to Mussammat Said Bibi) in favour of her daughter Mussammat Aishan. Upon this plaintiff and other collaterals of Hasham sued Mussammat Bhag Bhari and Mussammat Aishan and prayed for a declaratory decree to the effect that the said act on the part of Mussammat Bhag Bhari (which was described as a gift by her to Mussammat Aishan) would not affect their reversionary rights on the death of Mussammat Bhag Bhari. This suit failed, the Courts holding

(1) (1899) *I. L. R. 22 Mad. 323 (Zamorin of Calicut v. Narayanan Mussad).*

(2) (1878) *I. L. R. 2 All. 582 (F. B.) (Babu Lal v. Ishri Prasad).*

(3) (1884) *I. L. R. 6 All. 358 (Sheo Ratan Singh v. Sheo Sahai Misr).*

(4) (1904) *1 All. L. J. 228 (Balbhadar Nath v. Ram Lal)*

(5) *40 P. R. 1912 (Raja v. Mussammat Jannat Bibi).*

that Mussammat Aishan was the *khana-lamad* of her late father and thereafter plaintiff instituted the present suit in which he claims to recover possession from Mussammat Aishan on the ground that after the death of Mussammat Said Bibi, his late wife, he was entitled to succeed to the property given to his wife.

It is contended by defendant that the present suit is barred under section 11 and order II, rule 2 of the Civil Procedure Code. This contention was overruled by the Munsif on the ground that the cause of action in the present suit is distinct from the cause of action in the previous suit; that in the former suit the cause of action was the alienation by Mussammat Bhag Bhari, whereas in the present suit the cause of action upon which the claim is based is the death of plaintiff's wife and his consequent right to succeed to a life estate; and that therefore order II, rule 2 of the Code cannot apply.

The District Judge on appeal, while practically conceding that in law the cause of action in the present suit is the same as the cause of action in the former suit (*viz.* the death of plaintiff's wife), holds that the present suit is not barred because "these people know very little about their rights;" and the plaintiff in common with most agriculturists was under the impression that he could not recover the land until Hasham's widow died, and did not discover his mistake until the decision of the former suit. In these circumstances he holds that plaintiff should be allowed to sue afresh on the cause of action which he discovered when the first suit was dismissed. On the merits the learned Judge held that plaintiff was clearly entitled to succeed and dismissed defendant's appeal with costs.

The sole question before me on this second appeal is whether the present suit is barred by either section 11, explanation 4, or order II, rule 2 of the Civil Procedure Code and upon this point I have heard Mr. Devi Dial for the appellant, the respondent being unrepresented by counsel and naturally unable to argue the law point for himself.

There is a conflict of authority as to whether in a suit to recover possession of property a plaintiff is bound to support the claims made by him by bringing forward every title which he has, or claims to have, in respect of such property. In a large number of cases it has been held that he must put forward all his titles, and that if he does not do so and fails in his suit a subsequent suit to recover that property from the same defendant based upon a different title, will be *res-judicata*.

by reason of the provisions of section 11, explanation 4 of the Code, (see *I. L. R. 2 Cal. 152* (1), *3 Cal. 23* (2), *4 All. 21* (3), *3 Bom. 137* (4), *25 Bom. 189* (5), *31 Mad. 385* (6), *146 P. R. 1890* (7), the contrary opinion has been expressed in a still larger number of reported cases (see Garth, C. J., in *I. L. R. 2 Cal. 152* (1), *8 Bom. H. C. R. 89* (8), *I. L. R. 2 Mad. 352* (9), *4 Mad. 308* (10), *7 Mad. 264* (11), *26 Mad. 760* (12), *27 Mad. 104* (13), *22 Mad. 323* (14), *2 All. 582* (15), *6 All. 358* (16), *1 All. L. J. 228* (17).

In the present case that question does not arise, inasmuch as Muhammad Din was only one of several joint plaintiffs in the former suit who were seeking merely a decree declaratory of their alleged reversionary rights and were not claiming possession of the property, and in that suit the present claim based upon plaintiff's alleged exclusive title to present possession of the land, would have been inconsistent with the claim preferred by him and his co plaintiffs as reversioners jointly entitled to the property on the death of Mussammat Bhag Bhari. Explanation 4 of section 11 is thus clearly inapplicable, as the present claim could not have been brought forward by Muhammad Din as a ground of attack in the former suit (see *6 P. R. 1886* (18), *68 P. R. 1915* (19)).

Moreover, it has been found as a fact by the District Judge that Muhammad Din had no knowledge of his right to succeed on a life estate to the property left by his wife until the decision in the former suit made it clear to him that his wife was no less a *khanadam* of her father than her sister, Mussammat Aishan, and that he was therefore the person entitled by law and custom to hold the property for life. In these circumstances he cannot be said to have "intentionally

- (1) (1876) *I. L. R. 2 Cal. 152* (F. B.) (*Denobundhoo Chowdhry v. Kristomonce Dossce*).
- (2) (1877) *I. L. R. 3 Cal. 23* (*Bheeka Lal v. Bhuggoo Lal*).
- (3) (1881) *I. L. R. 4 All. 21* (*Sultan Ahmad v. Maula Baksh*).
- (4) (1878) *I. L. R. 3 Bom. 137* (*Haji Hasam v. Ibrahim*).
- (5) (1900) *I. L. R. 25 Bom. 189* (*Juddappa v. Tirkappa*).
- (6) (1908) *I. L. R. 31 Mad. 385* (*Masilamania Pillai v. Thirutengadam Pillai*).
- (7) *146 P. R. 1890* (*Pala Mal v. Maya*).
- (8) (1871) *8 Bom. H. C. R. 89* (*Bhisto Shankar v. Ram Chandrarat*).
- (9) (1879) *I. L. R. 2 Mad. 352* (*Sadaya Pillai v. Chinmi*).
- (10) (1881) *I. L. R. 4 Mad. 308* (*Thyila v. Thyila*).
- (11) (1883) *I. L. R. 7 Mad. 264* (*Allummi v. Kunjusha*).
- (12) (1902) *I. L. R. 26 Mad. 760* (*Ramaswami Ayyar v. Vythinatha Ayyar*).
- (13) (1903) *I. L. R. 27 Mad. 104* (*Veerana Pillai v. Muthu Kumara*).
- (14) (1899) *I. L. R. 22 Mad. 323* (*Zamorin of Calicut v. Narayanan Mussad*).
- (15) (1878) *I. L. R. 2 All. 582* (F. B.) (*Babu Lal v. Ishri Prasad*).
- (16) (1884) *I. L. R. 6 All. 358* (*Sheo Ratan Singh v. Sheo Sahai Misr*).
- (17) (1904) *1 All. L. J. 228* (*Balbhadar Nath v. Ram Lal*).
- (18) *6 P. R. 1886* (*Muhammad Din v. Rahim Gul*).
- (19) *68 P. R. 1915* (*Kura v. Madho*).

relinquished" any part of his claim, within the meaning of order II, rule 2, Civil Procedure Code.

As remarked by Garth, *C. J.* (*I. L. R. 2 Cal.*, p. 171) (1), "It must constantly happen that until the differences between contending parties have been ventilated and discussed in a Court of law, the litigants themselves are entirely ignorant of what their legal rights and position may be," and in *Amanat Bibi v. Muhammad Hussain* (*L. R. 15 Ind. App.* at p. 112) (2), their Lordships of the Privy Council observed that "a right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as 'a portion of his claim'."

No doubt, every body is presumed to know the law and ignorance of law cannot be urged as an excuse for a mistake made by a person. But as pointed out by Lord Westbury, Lord Chancellor, in the maxim *ignorantia juris hanc excusat* "the word *jus* is used in the sense of denoting general law, the law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application," (*Cooper v. Phibbs*, *L. R. 2 H. L. Cas.* at p. 170) (3).

For the reasons given I hold that the present suit is not barred either by section 11, explanation 4, or by order II, rule 2 of the Civil Procedure Code and I accordingly dismiss the appeal. Respondent has incurred no costs.

Appeal dismissed.

No. 95.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

TILOK CHAND—(DEFENDANT)—APPELLANT,

Versus

RAM CHAND—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 878 of 1912.

Declaratory suit—for removal of a mahant and declaration that plaintiff has the right to nominate a successor—consequential relief.

Plaintiff sued to have the defendant, who claimed under the will of the late Mahant and who had taken possession, removed and to have it declared that he, plaintiff, as a spiritual relation of the late mahant and as mahant of the parent shrine had the right to nominate a new mahant. It was objected

(1) (1876), *I. L. R. 2 Cal.* 152, p. 171 (F. B.) (*Denobundhoo Chowdhry v. Kristomonee Dossee*).

(2) *L. R. 15 Ind. App.* 112 (P. C.) (*Amanat Bibi v. Muhammad Hussain*).

(3) *L. R. 2 H. L. Cases* 170 (*Cooper v. Phibbs*).

inter alia that the suit in its present form did not lie as a suit for possession could be brought.

Held, following 56 P. R. 1895 (1), that as the prayer for removal of defendant from the office did not necessarily imply his *physical dispossession* and that all that was sought was a decree which would enable the successor, on appointment, to enforce his own right to take possession of the property, the suit as laid was competent.

I. L. R. 15 Mad. 15 (2), I. L. R. 16 Mad. 31 (3), and I. L. R. 22 Mad. 117 (4), not followed.

Second appeal from the decree of L. H. Leslie Jones, Esquire, Additional Divisional Judge, Amritsar Division, at Jullundur, dated the 22nd May 1912.

Mul Chand and Rambhaji Datta, for Appellant.

Govind Das and D. C. Ralli, for Respondent.

The judgment of the Court was delivered by—

21st March 1916.

CHEVIS, J.—The dispute in this case is as to the *mahantship* of the institution known as “Murti Ram Wali” Dharamsala situated in Katra Nihal Singh, Amritsar.

The late *Mahant* Tulsi Ram died shortly before the institution of this suit. Defendant is Tulsi Ram's elder brother. Just before he died Tulsi Ram executed a will in favour of defendant, describing him as his *chela* and leaving everything to him subject to the control of one Bhai Dyal Singh. Defendant has now taken possession, and plaintiff who claims to have the right to nominate a successor to the *mahantship* sues to have defendant removed and to have it declared that plaintiff has the right to nominate a new *mahant*. According to plaintiff Tulsi Ram left no *chela*, and plaintiff bases his claim to appoint a successor on two grounds, (1) that he is spiritually related to Tulsi Ram (see the tree on page 8 of the paper book) and (2) that he is the *Mahant* of the parent shrine.

The first Court dismissed the suit. The Divisional Judge on appeal held that the will, though executed by Tulsi Ram while in his full senses, incorrectly described defendant as *chela*. The learned Divisional Judge disbelieved the oral evidence as to defendant having been appointed a *chela*, and held that the mere execution of the will gave defendant no right to succeed, and that plaintiff, as *Mahant* of the parent institution, had a right to nominate a successor subject to the

(1) 56 P. R. 1895 (*Bawa Mangal Das v. Narinjan Das*).

(2) (1890) I. L. R. 15 Mad. 15 (*Abdul Kadar v. Mahomed*).

(3) (1892) I. L. R. 16 Mad. 31 (*Srinivasa Ayyangar v. Srinivasa Swami*).

(4) (1898) I. L. R. 22 Mad. 117 (*Srinivasa Swami v. Ramannuja Chariar*).

confirmation of the fraternity. So the Divisional Judge gave a decree declaring that plaintiff had a right to nominate a successor to the *mahantship* subject to the confirmation of the fraternity and to remove defendant from the office of *mahant*.

Defendant appeals, and the first ground of appeal is that the suit in its present form does not lie as a suit for possession could be brought. Rai Sahib Mul Chand cites 15 *Mad.* 15 (1), 16 *Mad.* 31 (2) and 22 *Mad.* 117 (3). The first of those rulings is distinguishable as in the present case plaintiff does not claim that he is entitled to succeed to the *mahantship* himself nor does he seek possession for himself. In the 16 Madras case the claim was brought by three of the disciples of a *mutt* asking (1) for a declaration that defendant was not the duly appointed successor of the late head of the *mutt*, and (2) that the Court should fill up the vacancy by appointing a successor. The suit failed as it was held that plaintiffs could have asked further that the *mutt* and its properties should be handed over to the person appointed as successor and the defendant should be ejected. In the 22 Madras case a somewhat similar suit was thrown out, it being held that it would be for the disciples to appoint a successor and that the defendant might take objection to the person appointed and then another suit would be necessary, whereas if an appointment was first made and the person appointed brought a suit everything could be settled in the one suit. These rulings seem to be in defendant's favour.

But in 56 *P. R.* 1895, (4) a suit in which certain plaintiffs sued to eject a *Mahant* for misconduct and for a declaration that they were entitled to nominate a successor it was held that plaintiffs were not seeking possession for themselves, that the prayer for removal of defendant *from the office* did not imply his *physical dispossession*, and that all that was sought was a decree which would enable the successor on appointment to enforce his own right to take possession of the property. This ruling seems to us a good guide, and we prefer to follow it rather than the Madras ruling. Here too a decree for removal *from the post* of *Mahant* does not necessarily mean defendant's physical removal *from the property*. When a successor is duly appointed he can eject defendant from possession of the property, bringing a suit if necessary. But there cannot be two *Mahants*, and until defendant is removed from the office and the office thus becomes vacant, how can any successor be

(1) (1890) *I. L. R.* 15 *Mad.* 15 (*Abdul Kadar v. Mahomed*).

(2) (1892) *I. L. R.* 16 *Mad.* 31 (*Srinivasa Ayyangar v. Srinivasa Swami*).

(3) (1898) *I. L. R.* 22 *Mad.* 117 (*Srinivasa Swami v. Ramanunja Churiar*).

(4) 56 *P. R.* 1895 (*Bawa Mangal Das v. Narinjan Das*).

appointed? It is a good thing to avoid multiplicity of suits, as far as possible, but it is the successor, and not plaintiff, who will have a right to claim physical possession, and so long as defendant remains *Mahant* no successor can be appointed.

It may be said that defendant is not really the *Mahant*, but he is at least *de facto Mahant*, at present. Granting that he is only a trespasser and that his presence is no bar to the appointment of a *Mahant*, and that the person so appointed will be able to sue for possession, the mere fact that in the future another person will be entitled to sue for physical possession seems to us no legal bar to giving plaintiff a declaratory decree in the present case.

The finding that defendant is not a *chela* of Tulsi Ram is one of fact, and cannot be disputed in second appeal. That the *Mahant* could not nominate an outsider as his successor merely by will is a point on which we have no doubt whatever.

But it is urged on behalf of defendant that the lower Appellate Court has found that plaintiff is entitled to nominate on a ground which plaintiff never advanced in the pleadings in the first Court, *viz.* that plaintiff is the *Mahant* of the parent institution. It is denied that plaintiff is the *Mahant* of a parent institution, and it is pointed out that there is no evidence to justify a finding that he is. Further it is urged that plaintiff as an Arya Samajist is disqualified from right of appointment. All this is however of little real consequence and to order further enquiry would be useless trouble, for any nomination, whether by the plaintiff or by any one else, is subject to the confirmation of the fraternity, so it is really the fraternity who will have the last say in the matter. Each party before us claimed to have the support of the *bhek* behind it. Recognizing that the *bhek* have the last word in the matter, and that without their confirmation plaintiff is powerless, Rai Sahib Mul Chand withdrew opposition to the lower Appellate Court's decree, provided that it was added that defendant should not be dispossessed from the property till a successor had been nominated and the nomination had been duly confirmed.

This is a reasonable settlement of the whole case. If plaintiff has not the support of the *bhek* he is powerless and it is useless for him to move in the matter. If he has the support of the *bhek*, the sooner he nominates a successor and gets his nomination confirmed by the *bhek* the better.

We accept the appeal only to this extent that we add to the decree of the learned Divisional Judge a condition that

defendant shall not be deprived of the physical possession of the Dharamsala and of any property which may belong to the Dharamsala until a successor has been duly appointed and the appointment has been confirmed by the fraternity. The plaintiff if he wished to succeed on the score of being *Mahant* of the parent institution should have stated this clearly in the pleadings, so that proper enquiry on this point might have been made. We therefore decline to allow him costs. The parties will bear their own costs in all Courts.

Appeal accepted.

No. 96

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Scott-Smith.*

FATTEH CHAND—(DEFENDANT)—APPELLANT,

Versus

BILAS RAI—(PLAINTIFF)—MUSSAMMAT KAURI AND
OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 207 of 1914.

Partition—suit for—Court fees on appeal contesting mode of partition—Court Fees Act, VII of 1870, section 7 (iv) (b) and schedule II, article 17—proper mode of partition where parties are in separate possession of joint houses.

The suit was by one co-sharer against 4 co-sharers for possession by partition of certain joint land, the *jama* of the whole being Rs. 345-7-2. Plaintiff alleged that the family house property had been already divided up. The Court decided that the suit could not proceed unless the house property was included. The house and garden were valued at some Rs. 46,000. The lower Court passed a preliminary decree fixing the shares of the parties and then appointed a Commissioner and ordered that "the separate pieces of immovable property shall be auctioned by the Commissioner among the parties, the share-holders being allowed to bid. The total sum thus paid in will be divided among the parties in the proportionate shares given above." One of the defendants then appealed to the Chief Court objecting to the mode of partition.

Held, that the stamp of Rs. 10 on the appeal was sufficient under article 17 (vi), schedule II of the Court Fees Act.

28 P. R. 1903 (1), distinguished.

Held also, that as the five co-sharers were in possession of various parcels of the house property, some having more and some less than their share, the ordinary mode of partition should be adopted, *viz.* to allot to each sharer houses approximately of the value of his or her share, at the same time respecting as far as possible previous actual possession, and to have any small excess or deficiency made good by money payments.

(1) 28 P. R. 1903 (*Hari Chand v. Jivan Mal*),

First appeal from the decree of H. K. Trevaskis, Esquire, District Judge, Ambala, dated the 23rd October 1913.

Gullu Ram, for Appellant.

Lakshmi Narain, for Respondents.

The judgment of the Court was delivered by —

22nd March 1916.

SIR DONALD JOHNSTONE, C. J.—In this case the first point for decision is a preliminary objection raised by Mr. Lakshmi Narain that the Rs. 10 Court-fee on this appeal is insufficient and should be made up to what the law requires. The suit was by one co-sharer against 4 co-sharers for possession by partition of certain joint land, the *jama* of the whole being Rs. 345-7-2. In the prayer it was said that the family house property had been already divided up, but, if defendants contested this, plaintiff should be allowed a separate suit for its partition. On 4th July 1912 the District Judge ruled that the suit must be for the whole of the joint property, whereupon an amended plaint was put in, which included the houses. Question as to the valuation of the houses and of a garden had been raised, and it had been summarily decided that the garden was worth Rs. 5,000 : the houses apparently remained standing at the value assigned by plaintiff—see pages 4 and 5, paper-book—*i.e.* some Rs. 41,760. On 23rd October 1913 the District Judge passed a preliminary decree settling shares, giving plaintiff 1/6th and present appellant Fattah Chand 1/3rd. The Court then appointed a Commissioner and directed that “the separate pieces of immoveable property shall be auctioned by the Commissioner among the parties, the share-holders only being allowed to bid. The total sum thus paid in will be divided among the parties in the proportionate shares given above.”

On 6th January 1914 the Commissioner held auction, and on 17th January defendant Fattah Chand filed this appeal, objecting to the mode of partition.

In these circumstances we think a Court-fee of Rs. 10 under article 17 (vi), schedule II, Court Fees Act, is sufficient and correct. In our opinion section 7 (iv) (b) has no application to the case, as it is impossible to assign a value to Fattah Chand's claim : 28 P. R. 1903 (1), relied on by the defence is not in point, for there the plaintiff was out of possession. Here appellant does not want to be put in possession of any property he has not got.

(1) 28 P. R. 1903 (*Hari Chand v. Jiwan Mal*).

This being so, we proceed to deal with case on the merits, first noticing that Mr. Lakhshmi Narain's contention that Fattch Chand is estopped by having bid at the auction cannot be accepted. Fattch Chand must have made up his mind to appeal before the auction, but like a prudent man he was obliged, in view of possible defeat on appeal, to take part in the auction and safeguard his interests.

The auction has taken place and we have perused its results. It seems to us quite clear that there was no occasion for resort to the method of auction. The five sharers are in possession of various parcels of the house property some having more and some less than their share; but the houses are numerous, and partition could quite conveniently be made in the ordinary way by allotting to each sharer houses approximately of the value of his or her share, at the same time respecting so far as possible previous actual possession, any small excess or deficiency being made good by money payments. This involves appointment of a Commissioner to value the property, the fees being paid by the parties in proportion to their shares, each party should be called upon to pay in his share. If any party objects, the plaintiff should pay subject to subsequent recovery. Not only is auction unnecessary, but it is obvious that in case like this it opens a door to trickery, each sharer being subjected to the temptation of running up the prices of houses held by the other sharers so as to enhance his own ultimate cash receipts.

We accept the appeal set aside the order of the Commissioner and his proceedings, and direct the lower Court to proceed to carry out the partition on the lines indicated above. Fattch Chand's costs here (pleader's fee Rs. 50) to be paid Mr. Lakhshmi Narain's client. Stamp on appeal refunded.

We may note that a *razinama* signed by Bilas Rai, Shadi Ram and Fattch Chand was presented to us yesterday, but we are unable to give effect to it as Atma Ram and Mussammat Kauri, defendants, gave no assent to it and Shadi Ram has backed out.

Appeal accepted.

No. 97.

Before Hon. Mr. Justice Rattigan.

JITA SINGH—(PLAINTIFF)—APPELLANT,

Versus

HARI SINGH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1038 of 1915.

Civil Procedure Code, Act V of 1908, order 23, rule 1—withdrawal of appeal in suit for declaration after death of alienor without express permission of Court to bring a fresh suit—bar to subsequent suit for possession.

Plaintiff as collateral of her deceased husband sued for the usual declaratory decree in respect of a mortgage made by Mussammat K. K., a widow. The suit was dismissed by the Munsif on the ground that consideration and necessity had been proved. Plaintiff appealed to the Divisional Judge and during pendency of his appeal Mussammat K. K. died, whereupon plaintiff prayed to be allowed to withdraw his appeal on the ground that he had now a fresh cause of action and could sue for possession. The Divisional Judge thereupon granted plaintiff's request to withdraw the appeal and dismissed it. Shortly after that plaintiff instituted the present suit for possession on the ground that the mortgage was effected for no necessary purpose and for no consideration.

Held, that permission to bring a fresh suit under order 23, rule 1 of the Code of Civil Procedure must be given in express terms and cannot be implied.

3 P. R. 1905 (p. 25) (1), referred to.

Held also, that the present suit for possession was barred under order 23, rule 1.

8 Indian Cases 1066 (2) and 28 Indian Cases 91 (3), referred to.

I. L. R. 21 Cal. 265 (1), 1 P. R. 1901 (5) and 4 Cal. W. N. 110 (6), distinguished.

Second appeal from the decree of S. S. Harris, Esquire, District Judge, Amritsar, dated the 16th January 1915.

Manohar Lal and D. C. Ralli, for Appellant.

Tek Chand, for Respondent.

The judgment of the learned Judge was as follows:—

23rd March 1916.

RATTIGAN, J.—The facts are simple. Mussammat Kishen Kour, a widow, mortgaged certain land to one Hari Singh for Rs. 600, whereupon her husband's collateral heir, Jita Singh, brought the usual suit for a declaratory decree. His suit was dismissed by the Munsif on the ground that necessity and consideration for the mortgage had been duly proved. He

(1) 3 P. R. 1905 (p. 25) (*Ghulam Ali Shah v. Shahabul Shah*).

(2) (1910) 8 Indian Cases 1066 (*Machana Ujjhala v. Goruguntulu*).

(3) (1915) 28 Indian Cases 91 (*Sennara Reddiar v. Venkatachula*).

(4) (1893) I. L. R. 21 Cal. 265 (*Kaminikant Roy v. Ram Nath*).

(5) 1 P. R. 1901 (*Thakur Das v. Jaswant Rai*).

(6) (1898) 4 Cal. W. N. 110 (*Gopal Chandra Banerjee v. Purna Chandra Banerjee*).

then appealed to the Divisional Judge and while his appeal was pending Mussammat Kishen Kour died. He accordingly prayed to be allowed to withdraw his appeal and stated that he had a fresh cause of action as he was now entitled to seek possession of the land. The Divisional Judge thereupon passed the following order :—

“I grant plaintiff's request to withdraw the appeal
 “. Appeal dismissed ’ This order is dated 17th
 March 1914.

On the 9th June 1914 Jita Singh instituted the present suit in which he claims to recover possession of the land mortgaged by Mussammat Kishen Kour, on the ground that the mortgage was effected for no necessary purpose and for no consideration and is therefore not binding upon him as the heir of the mortgagor's husband. The defendant, Hari Singh, pleaded that the present suit as framed was barred by order 23, rule 1 of the Civil Procedure Code and that plaintiff's sole remedy was to redeem the mortgage on expiry of its term (20 years from date of mortgage).

The Munsif dismissed the present suit on the ground that when plaintiff's appeal to the Divisional Judge in the former suit was dismissed, the findings of the first Court in that suit became final and binding and that consequently it must now be held that the mortgage impugned was valid and enforceable against plaintiff. On appeal the District Judge held that as the plaintiff had not in the first suit obtained the Divisional Judge's permission to institute a fresh suit, the present claim was barred under order 23, rule 1, Civil Procedure Code.

Plaintiff has appealed to this Court, but after hearing all that Mr. Manohar Lal had to urge on his behalf, I am satisfied that the suit has been rightly dismissed.

Mr. Manohar Lal's first contention was that in the former case the Divisional Judge had *impliedly* granted permission to plaintiff to bring another suit. But it has been held by a Division Bench of this Court (3 P. R. 1905 at p. 25 (1)), that in order to satisfy the provisions of section 373 of the Civil Procedure Code of 1882 (which correspond with the provisions of order 23, rule 1 of the present Code), the permission given by the Court must be in *express* terms and cannot be implied. This decision is binding upon me and I must follow it.

The learned counsel next urged that the words in order 23, rule 1, “in respect of the subject-matter of such suit

“or such part of a claim,” refer merely to the *relief* sought, and that if the relief sought in the second suit is different from the relief sought in the first suit, the rule in question is no bar to such second suit. In this connection he relies upon *I. L. R.* 21 *Cal.* 265 (1), 1 *P. R.* 1904 (2) and 4 *Cal. W. N.* 110 (3). These cases in no way support the proposition put forward, as all that was held in them was that a second suit, based upon an entirely different cause of action, was not barred merely because the parties and the property involved were the same as in the previous suit that had been withdrawn.

In the present case the parties and the property involved are admittedly the same and the cause of action against defendant, namely, the mortgage which plaintiff seeks to get rid of, is also the same.

The rulings cited by Mr. Tek Chand (8 *Indian Cases* 1066 (4) and 28 *Indian Cases* 91 (5)), are directly in point and are authorities for holding that order 23, rule 1 of the Code is a bar to the present suit.

I must accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 98.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Scott-Smith.*

SHARAF ALI KHAN—(DEFENDANT)—APPELLANT,
Versus

JAGANDAR SINGH AND NARANJAN SINGH—
(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 569 of 1914.

Indian Registration Act, XVI of 1908, section 17 (1) (b) (c)—registration—agreement to sell and execute sale-deed and acknowledgment of earnest money—oral evidence to prove payment—Indian Evidence Act, I of 1872, section 91.

Held, that a document which speaks of the sale deed being completed afterwards and the remaining purchase-money being paid at the time of its completion is really only an agreement to sell by means of a regular deed notwithstanding that it says at the beginning that a sale has taken place and

- (1) (1893) *I. L. R.* 21 *Cal.* 265 (*Kaminikant Roy v. Ram Nath*).
- (2) 1 *P. R.* 1904 (*Thakur Das v. Jaswant Rai*).
- (3) (1898) 4 *Cal. W. N.* 110 (*Gopal Chandra Banerjee v. Purna Chandra Banerjee*).
- (4) (1910) 8 *Indian Cases* 1066 (*Machana Uajhala v. Gorugantulu*).
- (5) (1915) 28 *Indian Cases* 91 (*Sennaya Reddiar v. Venkatachala*).

that such a document does not require registration as coming under section 17 (1) (b) of the Registration Act.

184 P. R. 1889 (F. B.) (1), referred to.

Held also, that although a receipt for the Rs. 600 earnest-money included in the document would require registration under section 17 (1) (c), that did not affect the agreement part of it as the two were separable, and oral evidence of the payment was admissible under section 91 of the Evidence Act.

73 P. L. R. 1910 (2) and I. L. R. 4 Bom. 126 (F. B.) (3), referred to.

First appeal from the decree of Lala Ganga Ram Soni, District Judge, Lyallpur, dated the 24th February 1914.

Fazli Hussain, Shuja-ud-din and Abdul Rashid, for Appellant.

Beechey, Ralli and Ram Chand, for Respondents.

The judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—Plaintiffs' suit is for possession of two-and-a-half squares of land and an *ahata* on the basis of an agreement to sell, executed on 10th January 1913 by defendant. The Lower Court took the pleadings and framed 7 issues, as stated in its judgment, the first four being issues on technical points raised. The findings briefly were—see judgment and also order of 11th August 1913—that the deed (Exhibit P. 1) is a contract to sell and that the Rs. 600 acknowledged in it is not part payment of price, and so the document did not require registration; that plaintiffs did not need to sue for a sale-deed, but are right in suing for possession of the land; that defendant certainly executed Exhibit P. 1; that Rs. 600 earnest-money certainly passed; that the *ahata* is not proved to have been sold along with the squares. 24th March 1916.

Plaintiffs acquiesce in the dismissal of the claim for the *ahata*, but defendant has appealed against the decree for the two and-a-half squares.

In our opinion Exhibit P. 1 is certainly not a sale-deed of the land. No doubt it begins by saying "I have absolutely sold the land," but this is merely in a manner of speaking: the real meaning comes out in the words—"I will take the remaining money at the time of the completion of the sale-deed. I shall get the sale-deed completed after going to the spot on the 15th February 1913." The document is really only a promise to sell by means of a regular deed, *plus* an acknowledg-

(1) 184 P. R. 1889 (F. B.) (*Sardar Partab Singh v. Karm Chand*).

(2) 73 P. L. R. 1910 (*Ram Chand v. Chattar Singh*).

(3) (1879) I. L. R. 4 Bom. 126 (F. B.) (*Waman Ram Chandra v. Dhondiba Krishnaji*).

ment of receipt of Rs. 600 earnest-money. Such documents have never in the Punjab been held as coming under section 17 (1) (b), Registration Act—*cf.* 184 P. R. 1889 (F. B.) (1).

But counsel for defendant argues further that clause (c) covers the case, and quotes in support 73 P. L. R. 10 (2) and 4 Bom. 126 (F. B.) (3). The former ruling is one by a single Judge, and whether correct or not, is easily distinguishable, for there the sale had already taken place and was complete, while here no sale had been yet effected. The Bombay case, however, is authority for the view that a receipt for earnest-money in the case of a sale of property with more than Rs. 100 comes under clause (c) aforesaid, and must be registered to be admissible in evidence; but on the other hand two considerations emerge in the present case to save plaintiffs from the consequences of this *dictum*—first, the agreement part of Exhibit P. 1, which does not require registration, is separable from the receipt part, which does; secondly under section 91, Indian Evidence Act, oral evidence of the payment of Rs. 600 earnest-money is admissible, even if the acknowledgment contained in Exhibit P. 1 is excluded by section 17 (1) (c), Registration Act. For the latter proposition we have as authority the same Bombay ruling.

It is argued, on the merits, that defendant never executed Exhibit P. 1 or received the Rs. 600 and that he was ill and incapable of transacting business at the time. The marginal witnesses to the paper are Manne Khan, Maya Ram, and Sardar Kirpa Singh. The second and third of these have been called and fully support the plaintiffs' case, both as to execution of document and of payment of cash; and we are unable to see any indications pointing to bad faith in them. The affair occurred at Chak 130, some two miles or less from Chak 132, where plaintiffs and these witnesses live. It was natural for plaintiffs to take these two respectable men to witness an important transaction like this. Maya Ram is a shopkeeper, in no way specially dependent on plaintiffs, and Kirpa Singh is a substantial farmer, renting land at an annual rate of Rs. 1,850. Diwan Chand, School Master of Chak 132, corroborates, and one plaintiff Narinjan Singh goes into the box and swears to his own case. No doubt Manne Khan was not called, but this was unnecessary if defendant thought he was against plaintiffs, why did he not call him himself?

(1) 184 P. R. 1889 (F. B.) (*Sardar Partab Singh v. Karm Chand*).

(2) 73 P. L. R. 1910 (*Ram Chand v. Chhattar Singh*).

(3) (1879) P. L. R. 4 Bom. 126 (F. B.) (*Waman Ram Chandra v. Dhondiba Krishnaji*).

Defendant's evidence is chiefly negative, and an attempt is made to shew that defendant was ill and incapable. The doctor only shews defendant had pneumonia about 18th or 20th December 1912, and we place no reliance upon the other witnesses who pretend that defendant was desperately ill all through December, January and February. And another strong reason for believing in plaintiffs' *bona fide* is the fact that the bargain is by no means a very good one for him, as the price fixed Rs. 13,000 is apparently a very high one.

For these reasons we think the Lower Court's decision is correct and we dismiss the appeal with costs.

Appeal dismissed.

No. 99.

Before Hon Mr. Justice Shadi Lal and Hon. Mr. Justice LeRossignol.

THAKUR DAS—(PLAINTIFF)—APPELLANT,

Versus

RADHA KISHAN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1718 of 1914.

Mortgage—failure to deposit redemption money within time fixed in decree of Lower Appellate Court—whether bar to second appeal—mortgagee in possession—failure to keep accounts of expenditure.

Held, that failure to deposit the redemption money within the time fixed in the Lower Appellate Court's decree does not necessarily bar the hearing of a second appeal in the Chief Court.

161 P. R. 1890 (1), referred to.

I. L. R. 23 All. 88 (2), I. L. R. 31 All. 328 (3) and I. L. R. 23 Mad. 521 (4), distinguished.

Held also, that failure on the part of the mortgagee in possession to keep accounts of expenditure does not *ipso facto* defeat a claim to compensation which is proved in other ways, although all presumptions will in that case be made in favour of the mortgagor.

Second appeal from the decree of Major A. A. Irvine, Divisional

Judge, Lahore, dated the 15th June 1914.

Oertel and Mukerji, for Appellant.

Broadway, Gobind Das and Tek Chand, for Respondent.

The judgment of the Court was delivered by—

LEROSSIGNOL, J.—This is a redemption suit in which 25th March 1916. possession was decreed by the first Court to the mortgagor's

(1) 161 P. R. 1890 (*Umrao Singh v. Muhamad Karim Bakhsh*).

(2) (1900) I. L. R. 23 All. 88 (*Shouvarain v. Channi Lal*).

(3) (1909) I. L. R. 31 All. 328 (*Ram Dhani Sahu v. Lalit Singh*).

(4) (1899) I. L. R. 23 Mad. 521 (*Venkata Krishna Ayyar v. Thiagaraya Chetti*).

vendee on payment of Rs 11,664—a sum which was enhanced by the Appellate Court to Rs. 12,232.

Respondent raises a preliminary objection that as the appellant has not deposited the redemption money in Court within the time ordered by the Lower Appellate Court, there is no decree for redemption subsisting in his favour.

23 *All.* 88 (1), 31 *All.* 328 (2), 23 *Mad.* 521 (3) are quoted, by the respondent, but these authorities are not in point, and we approve of the principle enunciated in 161 *P. R.* of 1890 (4) that failure to comply with the decree of the lower Courts does not necessarily bar the hearing of the appeal.

The appeal however fails on the merits. The first ground is withdrawn and appellant's main contention is that, on a proper interpretation of the mortgage-deed, interest accrues on the principal not from date of the deed but from a date 20 years posterior to the date of the mortgage. Having carefully consulted the document, we find no strength in this contention.

The next point is that the conditions of the mortgage are too onerous to justify their enforcement. The conditions are undoubtedly onerous, but we have no doubt that they were made so expressly, by consent of parties, whose intention clearly was that there should be no redemption. In fact the mortgage was a sale in disguise, and the plaintiff knowingly purchased a law suit.

The last point was that defendant was not entitled to compensation for additions and repairs as he had kept no accounts and has not accounted for income from the property.

It is no doubt the duty of a mortgagee to keep accounts of such expenditure, and if he does not, all presumptions will be made in favour of the mortgagor, but failure to keep accounts does not *ipso facto* defeat a claim for compensation which is proved in other ways.

The value of the additions and the cost of repairs are matters of fact which we, as a Court of second appeal, cannot touch, and the intention of the parties to the mortgage was that the mortgagee should enjoy the income.

With regard to the prayer for extension of time for complying with the Lower Appellate Court's decree, we see

(1) (1900) *I. L. R.* 23 *All.* 88 (*Sheonarain v. Chunni Lal*).

(2) (1909) *I. L. R.* 31 *All.* 328 (*Ram Dhani Sahu v. Lalit Singh*).

(3) (1899) *I. R. R.* 23 *Mad.* 521 (*Venkata Krishna Ayyar v. Thiagaraya Chetti*).

(4) 161 *P. R.* 1890 (*Umrao Singh v. Muhammad Karim Bakhsh*).

no reason to interfere, for the appellant clearly had no intention of complying with it, if the redemption money remained at the figure computed by the Lower Appellate Court.

The question of Court-fee has already been decided and is not mentioned before us, and the defendant's cross appeal is withdrawn.

The appeal is dismissed with costs.

Appeal dismissed.

No. 100.

Before Hon. Mr. Justice Rattigan.

MUSSAMMAT NUR BHARI AND OTHERS—

(PLAINTIFFS)—APPELLANTS,

Versus

ABDUL GHANI KHAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1437 of 1915.

Custom—succession—ancestral property—Pathans of Kasba Shahabad, tahsil Thanesar, district Karnal—sister or collaterals in fifth degree—Riwaj-i-am.

Held, that it had not been proved that the plaintiffs, a sister and sister's son, on whom the *onus* lay, had by custom among Pathans of Kasba Shahabad, tahsil Thanesar, district Karnal, preferential rights of succession to the defendants, collaterals in the fifth degree, although the rights of daughters were well recognised and there was a *tendency* to regard sisters and sisters' sons favourably and to prefer them to remote collaterals.

134 P. R. 1907 (F. B.) (1), referred to.

Also Rattigan's Digest of Customary Law, paragraph 24 and the Customary Law of the Panipat Tahsil and Karnal Pargana, Karnal District, 1910, p. 19.

First appeal from the decree of Sardar Ali Hussain Khan, Kazalbash, District Judge, Karnal, dated the 16th February 1914.

Raghu Nath Rai and Mohsin Shah, for Appellants.

Sundar Das, for Respondents.

The judgment of the learned Judge was as follows:—

RATTIGAN, J.—This is a first appeal to the Chief Court, preferred upon the authority of No. 30 P. R. 1915 (2), from the judgment and decree passed by Sardar Ali Hussain Khan, Kazalbash, on the 16th February 1914 in his then capacity of District Judge, Karnal.

27th March 1916.

The parties are Pathans of kasba Shahabad in the Thanesar Tahsil of the Karnal District, and the property in suit

(1) 134 P. R. 1907 (F. B.) (*Hamira v. Ram Singh*).

(2) 39 P. R. 1915 (*Meugens v. Suttlej Flour Mills*).

comprises 177 *bighas* 4 *biswas* of land situate in *mauza* Shabzadpur and *mauza* Patti Boripur and certain *ala milkiyat* rights in land in *mauza* Zainpura. The parties are admittedly governed by custom, and the sole question is whether a sister and a sister's son have the right to succeed to the said property in the presence of the deceased proprietor's agnatic heirs related to him in the 5th degree.

The facts are very simple. The property originally belonged to one Ghulam Mustafa Khan who died some years ago without issue, male or female. After his death his widow Mussammat Man Bibi succeeded on the usual widow's tenure and died in 1910, whereupon plaintiffs (who are Ghulam Mustafa's sister and the son of another sister) and defendants (who are his collaterals in the fifth degree) both claimed the right to have mutation effected in their respective favour. The Revenue authorities upheld defendants' claim and mutation was accordingly made in their names, with the result that plaintiffs instituted the present suit in the Court of the then District Judge. The learned Judge after framing the one issue raised by the pleadings, namely, "whether plaintiffs "have a preferential right to the property left by Ghulam "Mustafa Khan in the presence of his reversionary heirs," recorded the evidence of a few witnesses and then appointed Maulvi Abdul Aziz, a local legal practitioner, to make a local inquiry as to the custom obtaining among the parties. The local commissioner after a thorough inquiry submitted a lengthy report to the Court and gave it as his opinion that plaintiffs had failed to establish their case.

The District Judge in a very brief and most unsatisfactory judgment simply stated that he agreed with the local commissioner's conclusions and gave judgment against plaintiffs whose suit was dismissed with costs. This judgment is not of the slightest assistance to an Appellate Court. No attempt is made to deal with the evidence or to criticise the instances which plaintiffs adduced in support of their contentions, with the result that an appeal which ought in the ordinary course to have occupied not more than one or two hours of this Court's time, has taken the whole of a day's hearing. I regret to say that I have rarely met with a case where the Court has in a suit of importance, so entirely failed to do its duty, and I am not surprised that the appellants have taken grave objection to the District Judge's procedure. They were entitled to expect from him an independent judgment giving reasons for refusing to accept the instances which they endeavoured to prove not

merely by oral evidence but also by the production of mutation entries and copies of judgments delivered in earlier cases. But so far from giving any such reasons, the District Judge has absolutely ignored the whole of this documentary evidence and has merely remarked that he agrees entirely with the local commissioner. A judgment of this kind is obviously worthless and had it not been for the fact that the District Judge who delivered it has since been transferred to another part of the Province, I should have ordered the record to be returned to him with a direction that he should write a judgment in accordance with law.

In the circumstances I have heard the appeal argued in elaborate detail and have endeavoured to make myself fully acquainted with the whole of the evidence, oral and documentary. I have also carefully considered the report of the local commissioner.

In a case of this kind where the plaintiffs are the sister and the son of another sister of the late male proprietor and are seeking to recover land from that proprietor's collaterals in the fifth degree, in whose favour mutation has been effected, the burden of proof is clearly upon them to establish affirmatively the special custom by which they are entitled to succeed in preference to those collaterals. The ordinary rule of customary law prevailing among agricultural tribes of this Province is that a sister and her issue are excluded from the inheritance, (see Digest of Customary Law, paragraph 24), and the general custom prevailing in Delhi, Rohtak, Gurgaon and Karnal Districts is against even the right of a daughter to succeed (see Tribal Law, pages 131, 133; Customary Law of the Panipat *Tahsil* and Karnal Pargana, Karnal District, 1910, at page 19).

In the present case plaintiffs have adduced a considerable number of instances which tend to show that Pathans of *Kasba Shahabad* recognise daughters as heirs and it may be that such is their custom. But assuming this to be so, I cannot agree that these instances materially support plaintiffs' case, for, as observed by Clark, C. J., in delivering the judgment of the Full Bench reported as No. 134 *P. R.* 1907 (1), "In no system of law, that we are aware of, are the claims of daughters and sisters placed on the same footing, and we cannot imagine that the agriculturists of this Province by a subtle train of reasoning would ever put them on the same footing."

It seems to me, therefore that for the purposes of the present case all instances relating to the succession of daughters are beside the point and irrelevant, and I do not propose to discuss them. Nor again can I attach any value to the broad, general statements made by witnesses who endeavour to assist the party by whom they are called by asserting general rules of succession but are unable to refer to precedents in support of their assertions. Evidence of this nature (if it can be dignified by the name of evidence) is of no value and is easily procurable.

The real question in the case is whether plaintiffs have been able to establish any definite instance of a sister of the late male owner succeeding to his land in the presence, and to the prejudice, and without the consent, of his collaterals. In support of their case plaintiffs rely upon (1) six mutation entries, (2) four judicial decisions, and (3) some 30 instances given by witnesses in Court or before the local commissioner. I have carefully scrutinized all these precedents and in my opinion they are quite insufficient to prove the special custom set up.

(1) As regards the mutation entries, the first (mutation No. 2, dated 26th January 1885) goes to show that a son of the sister of the widow, Mussammat Begam, succeeded to Sher Khan's property. If this instance is correct, custom would seem to go much further than even plaintiffs contend for and the obvious inference is that Sher Khan had no collaterals living or that they consented to the mutation.

The second is even more peculiar (mutation No. 274, dated 19th May 1900) for acceding to it, the inheritance passed on Mussammat Jhando's death to the husband of *her* sister. The same explanation would seem to apply to this instance also.

The third (mutation No. 467, dated 15th June 1905), shows that on the death of Munir Khan, his land passed to Mussammat Jan Bibi, his sister's daughter. This, so far as it goes, is a good instance as Samand Khan, a collateral of the deceased was alive. The pedigree-table, however, shows that Samand Khan was childless and it was, therefore, probably with his consent that Mussammat Jan Bibi succeeded.

The fourth (mutation No. 486, dated 9th March 1905) is not in point, as in this case the daughters of Ahsan Khan succeeded on the death of their mother, Ahsan Khan's widow.

The fifth (mutation No. 179, dated 26th July 1911) relates to the succession of Sher Muhammad on the death of Mussammat Aziz Bibi, widow of Nannu Khan. Sher Muhammad was according to the entry a grandson of Nannu's paternal aunt and his right to succeed was challenged in Court by Nannu's collaterals. The dispute was referred to arbitration and settled by an amicable arrangement out of Court, (see the judgment of Maulvi Muhammad Bakar, Munsif, dated 19th May 1913, hereinafter referred to).

The sixth (mutation No. 77, dated 24th December 1908) is not very relevant. Mussammat Hussain Bibi appears to have succeeded to the property as the daughter of Mussammat Begam-un-Nisa who had herself apparently succeeded as the daughter of Nathu. On Mussammat Hussaini's death the property reverted to the sons of Mussammat Begam-un-Nisa's sister, Mussammat Hafizān, another daughter of Nathu. The instance is really one of daughter's sons succeeding, as Mussamat Hafizān's sons were the sons of the last male owner's daughter.

2. The judicial decisions have been analysed by the local commissioner and do not materially support plaintiff's case.

Mr. Barkly's judgment dated 18th April 1863 relates to a case of daughters and daughters' sons. The dispute was referred to arbitration and in their award the arbitrators, quite irrelevantly, remarked that sisters and sisters' sons succeed by custom immediately after brothers and their descendants. It is added, however, that no case of a sister's succession has actually occurred and the inference obviously is that the statement in their favour was merely a pious opinion on the part of the arbitrators.

The judgment of Maulvi Bahadur Hussain, dated 15th May 1884, is in plaintiffs' favour, but its value is much detracted from by the fact that on appeal it was held that the person who was contesting the sisters' rights, one Akbar was in fact not the collateral of the late owner, Gul Khan, and therefore had no *locus standi*. There was thus no collateral to challenge the sisters' sons' succession.

The judgments of Sayad Muhammad Bakar, Munsif, (dated 19th May 1913) and of Pandit Hari Kishen Kaul, Additional District Judge (dated 26th January 1897) were based on compromises arrived at by the parties out of Court, and in the first case the collaterals distinctly stated that they were settling the dispute merely because they were averse to protracting litigation with relations.

3. As to the 30 alleged instances referred to by the witnesses, 24 relate to succession of daughters and of the remaining 6, one (No. 14) is clearly wrong as, according to the mutation entry No. 486, dated 9th March 1915, Mussammat Zahuri was succeeded by the daughters of her late husband, Ahsan Khan. Instance No. 15, if true, would show that the sons of Mussammat Buland Bibi's sister succeeded on her death to property left by her husband, Saadat. If so, obviously the collaterals must have acquiesced in, or consented to, the succession, as custom could hardly be expected to recognise a preferential right of succession in the *widow's* sister's sons.

No. 24 does not tally with No. 15, but it is correct so far that according to the mutation entry No. 486, Mussammat Zahuri was succeeded by Mussammat Niaz Bibi and Faiz Bibi, though it is (according to that entry) wrong in describing these ladies as *sisters* of Ahsan Khan, as they were in fact his *daughters*.

No. 25 relates to the same family (Ahsan Khan) and is easily explainable. Ahsan Khan's land went first to his widow Mussammat Zahuri, and on her death it passed to Ahsan Khan's two daughters Mussammat Faiz Bibi and Niaz Bibi. On the death of Mussammat Niaz Bibi her share in the land passed to the sons of her sister, Mussammat Faiz Bibi, or in other words, to the sons of Ahsan Khan's other daughter. It is true that in instance No. 25 Mussammat Niaz Bibi is described as the daughter of Gabe Khan, but I am of opinion that the mutation entry No. 486 is more accurate in this respect than the witnesses who depose to instances Nos. 14 and 25, and that in point of fact, Niaz Bibi and Faiz Bibi were the daughters of Ahsan Khan.

No. 26 refers to the succession which is the subject matter of mutation entry No. 2, dated 26th January 1905, which I have already discussed.

As regards the remaining two instances (numbered 16 and 19 on the local commissioner's list) nothing very much seems to be known, though it is possible that No. 19 relates to the same case as mutation entry No. 467, dated 15th June 1905, with which I have already dealt.

After full and careful examination of all the instances referred to in the evidence, documentary and oral, adduced by plaintiffs, the conclusions at which I arrive are (1) that the rights of daughters are well recognised by the custom of the parties and that they and their sons are entitled to succeed in the absence of direct male lineal descendants of the last

male proprietor; (2) that there is a *tendency* to regard sisters and sisters' sons favourably and to prefer them to remote collaterals as the heirs of such proprietor; but (3) that it has not been proved that the custom of the parties recognises the right of a proprietor's sisters and their sons to succeed to his land in preference to collaterals related to him in the fifth degree. I must accordingly reject this appeal, but in view of all the circumstances and of the fact that the lower Court has not attempted to deal with the case as it should have done, I leave the parties to bear their own costs throughout. With this modification, the appeal is rejected.

Appeal rejected.

No. 101.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Le Rossignol.

MANOHAR LAL—(PLAINTIFF)—PETITIONER,

Versus

MUSSAMMAT SADIQA BEGAM—(DEFENDANT)—
RESPONDENT.

Civil Revision No. 100 of 1915.

Punjab Courts Act, III of 1914, section 44—revision—failing to determine crucial point when deciding question of limitation—material irregularity—Indian Limitation Act, IX of 1908, section 6 and article 164—application to set aside an ex-parte decree—minority—General Clauses Act, X of 1897, section 6.

A mortgagee instituted a suit after the death of the mortgagor for the recovery of the money due on the mortgage against the mortgagor's representatives *viz.*, his mother, widow and minor children. On 20th August 1908 an *ex-parte* decree was passed and the mortgaged property was sold in execution of that decree.

On 1st May 1914 the five children—three adults and two minors—applied to have the *ex-parte* decree set aside. The lower Court, without considering whether the provisions of the Limitation Act of 1877 or the Act of 1908 applied, decided that the application was in time.

Held, that where it is essential to a proper decision of a point of limitation to determine whether the provisions of the Limitation Act of 1877 or of the Act of 1908 are applicable and the lower Court fails to determine this question the omission amounts to a material irregularity and a revision is competent.

60 P. R. 1897 (F. B.) (1), 72 P. W. R. 1910 (2) and Civil Revision 52 of 1914 (unpublished), referred to.

Held, also, that the period laid down in article 164 for an application to set aside an *ex-parte* decree cannot be extended on the ground of minority

(1) 60 P. R. 1897 (F. B.) (Pandit Rama Kant v. Ragdeo).

(2) 72 P. W. R. 1910 (Delhi Cloth and General Mills Company v. Hardhian Singh).

under section 6 of the new Limitation Act of 1908 which is limited to applications for the execution of a decree.

Held further, that the application in this case dated 1st May 1914 was governed by the Limitation Act of 1908 and not by the Act of 1877, notwithstanding the provisions of section 6 (c) of the General Clauses Act.

I. L. R. 35 Mad. 678 (1), 12 Bom. L. R. 730 (2) and I. L. R. 37 All. 597 (3), referred to.

90 P. R. 1904 (4), distinguished.

Revision from the order of Sayad Wali Shah, Senior Subordinate Judge, Rohtak, dated the 15th January 1915.

Tek Chand, for Petitioner.

Umar Bakhsh, for Respondent.

The order of reference to a Division Bench was delivered by—

20th Jany. 1916.

SHADI LAL, J.—On the 25th November 1900 Razi-ud-din, a petition-writer of the town of Rohtak, mortgaged certain house properties to the plaintiff by a registered deed, and entered into certain stipulations for the payment of the debt. He died without discharging his liability, and on the 24th July 1908 the mortgagee instituted a suit for the recovery of the money against the mortgagor's representatives, namely his mother Mussammatt Rafi-ul-Nissa, his widow Mussammatt Rauf-ul-Nissa, and his minor children under the guardianship of their mother and grandmother. The defendants did not appear in obedience to the summonses issued to them, and the Court after directing *ex-parte* proceedings passed a decree in favour of the plaintiff on the 20th August 1908.

In execution of the decree, notices were, on different occasions, issued to the judgment-debtors, the mortgaged property was sold by auction, the objections preferred by certain persons were rejected, and the sales confirmed by the Court in favour of the decree-holder. The houses purchased by him were subsequently sold to one Ali Muhammad by a deed dated the 1st February 1913.

On 1st May 1914, nearly six years after the date of the decree, five children of the mortgagor—three adults personally, and two minors through their maternal grandfather—applied to the Subordinate Judge for setting aside the *ex-parte* decree, and this application has been accepted by the Court. The main question for determination was whether the application

(1) (1910) *I. L. R. 35 Mad. 678* (*Chidambaram Chetty v. Karuppan Chetty*).

(2) (1910) *12 Bom. L. R. 730* (*Hope Mills Ltd. v. Vithaldas Pranjiwandas*).

(3) (1915) *I. L. R. 37 All. 597* (*Jia Bibi v. Ilahi Bakhsh*).

(4) 90 P. R. 1904 (F. B.) (*Sahib Dad v. Rahmat*).

was barred by time and whether the Limitation Act of 1908 or the Act of 1877 applied to the case. Now, the Subordinate Judge, without recording a finding whether the old or the new law governed the application, has disposed of the matter in a summary manner with a brief observation to the following effect: "There is no period of limitation running against the minors as they were as such at the time of the institution of the suit."

The plaintiff has preferred an application for revision against the order setting aside the *ex-parte* decree, and having regard to the definition of the word "case" in 60 P. R. 1897 (F. B.) (1) and in view of the decisions in 72 P. W. R. 1910 (2) and Civil Revision 52 of 1914 I am of opinion that an application for revision is competent and that the omission of the lower Court to determine the crucial point in the case amounts to a material irregularity.

It will be observed that section 6 of the Limitation Act of 1908 is materially different from section 7 of the Act of 1877, and that, under the new law, the plea of minority is available only in the case of suits and applications for execution.

An application for setting aside an *ex-parte* decree is not mentioned in section 6 and the period of limitation prescribed by article 164 cannot, therefore, be extended. It seems to me that the Limitation Act of 1908 prescribes the rule of limitation and that the application of the respondents is barred by time. The decision of the Madras High Court in *I. L. R. 35 Mad. 678* (3) favours the applicability of the new Act, and, as at present advised, I am disposed to accept the rule of law enunciated in that judgment. The point is, however, of some importance and should, I think, be authoritatively decided by a Division Bench. I accordingly refer the case for decision to a Division Bench and direct that an early date be fixed.

The judgment of the Division Bench was delivered by—

SHADI LAL, J.—The relevant facts are set out in the order dated the 20th of January 1916 referring the case for decision to a Division Bench. The point for determination is whether the application made on the 1st of May 1914 by some of the defendants to set aside the *ex-parte* decree passed against them on the 20th of August 1908 is within time. The decision of the matter depends upon the answer to the question whether

27th March 1916.

(1) 60 P. R. 1897 (F. B.) (*Pandit Rama Kant v. Ragdeo*).

(2) 72 P. W. R. 1910 (*Delhi Cloth and General Mills Company v. Hardhian Singh*).

(3) (1910) *I. L. R. 35 Mad. 678* (*Chidambaram Chetty v. Karuppan Chetty*).

the Limitation Act of 1908, or the repealed Act XV of 1887, prescribes the law governing the application. Now, this is the crucial point in the case, and the lower Court has committed a material irregularity in omitting to determine it, though it was distinctly raised by the decree-holder and formed the subject of an issue.

It is contended by Mr. Umar Bakhsh for the respondents, that as against the defendants, who were minors at the time of the decree, the period of limitation does not begin to run until the cessation of their minority. This contention is no doubt based upon section 7 of the old Act, because section 6 of the Limitation Act of 1908, which replaces the aforesaid section, confines the operation of the plea of minority to suits and only one kind of applications, namely those for execution of decree. It is manifest that an application to set aside an *ex-parte* decree does not come within the exception created by section 6 of the present Act, and that the defendants cannot under that section invoke their minority as a bar to limitation.

The application in question was made, as already stated, on the 1st of May 1914 more than five years after the enforcement of the Limitation Act of 1908, and it is *prima facie* governed by that statute, unless the operation thereof is excluded by some rule of law. The learned pleader for the respondents places his reliance upon section 6 of the General Clauses Act, and argues that the right to make an application to set aside the *ex-parte* decree accrued under the repealed Act and is not affected by the provisions of the new Limitation Act. This contention is, in our opinion, altogether untenable, and cannot be accepted. We doubt very much whether the alleged right to make an application of this nature can be deemed to be a "right" or "privilege" within the purview of section 6 of the General Clauses Act. However that may be, we are clear that the right, if any, was acquired, not under the Limitation Act which merely regulates the period within which the remedy must be sought, but under the Civil Procedure Code.

Further, section 6 of the General Clauses Act provides in explicit terms that the rule laid down therein is to be enforced, if an intention to the contrary is not expressed by the Legislature. As pointed out by the Madras High Court in *I. L. R. 35 Mad. 678* (1), the intention of the Legislature is manifested in more places than one. We find that section 3 of the new Act provides that subject to the provisions contained in sections 4

(1) (1910) *I. L. R. 35 Mad. 678* (*Chidambaram Chetty v. Karuppan Chetty*).

to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by the first schedule shall be dismissed, although limitation has not been set up as a defence. Now, there is nothing in the aforesaid sections to save the limitation in respect of an application to set aside an *ex-parte* decree, and under article 164 of the first schedule, the Court is bound to reject the application, if it is made after the expiry of 30 days from the date mentioned therein.

A further indication of the intention of the Legislature is to be found in section 30 of the Indian Limitation Act of 1908, which prescribes a period of two years after the enforcement of the Act for the institution of those suits, the limitation for which has been curtailed by the new law. It will be observed that the section makes no reference to applications, and the obvious inference, therefore, is that the Legislature intended to apply the provisions of the Act to all the applications, even where the limitation prescribed thereby is shorter than that prescribed by the old Act. It is noteworthy that the Act of 1908, though passed in August 1908, did not come into force until the 1st of January 1909, and the intervening period of 5 months was ample time, within which the persons concerned could become acquainted with its provisions and take steps to enforce their remedy.

We find that article 164 of the new Act is materially different from article 164 of the old Act, and that the Bombay and Allahabad High Courts have held in 12 *B. L. R.* 730 (1) and 1. *L. R.* 37 *All.* 597 (2) that an application made after the 1st of January 1909 to set aside an *ex-parte* decree passed before that date is governed by article 164 of the new Act and not by article 164 of the old Act. The principle to be deduced from these two cases is that the law to be applied in a case of this kind is the law existing at the time when the application is made.

The decision in 1. *L. R.* 35 *Mad.* 678 (3) is exactly on all fours with the present case, and the learned pleader for the respondents admits that he is unable to suggest any distinction. The ruling of a Full Bench of this Court in 90 *P. R.* 1904 (4) has no bearing on the point before us, because the learned Judges, who decided that case, did not find any contrary intention in the Punjab Limitation Act, I of 1900, and accord-

(1) (1910) 12 *Bom. L. R.* 730 (*Hope Mills Ltd. v. Vithaldas Pranjivandas*).

(2) (1915) 1. *L. R.* 37 *All.* 597 (*Jia Bibi v. Ilahi Bakhsh*).

(3) (1910) 1. *L. R.* 35 *Mad.* 678 (*Chidambaram Chetty v. Karuppan Chetty*).

(4) 90 *P. R.* 1904 (*F. B.*) (*Sahib Dad v. Rahmat*).

ingly held that a cause of action, which arose under the old law, was not affected by the provisions of that statute. The intention of the Legislature in the present case is unmistakably manifested in various ways, and we have, therefore, no hesitation in holding that the Limitation Act of 1908 governs the case.

Upon the merits the facts are simple and do not admit of any real doubt. It is clear that the suit was instituted upon the footing of a mortgage executed by one Riaz ud-Din, a petition-writer of Rohtak against his widow, mother and minor children, as representing his estate. It appears that the widow was appointed guardian *ad litem* of her own children, and the mother guardian *ad litem* of the deceased's children by another wife, who was dead at that time. Both the ladies were served with notices in their personal capacities as well as on behalf of the minors; and the Code of Civil Procedure of 1882 did not contain any provision requiring personal service upon the minors. There was, therefore, no defect in the service of the summonses, and under article 164 the application having been made after the expiry of 30 days from the date of the service is clearly barred by time.

Assuming that the date of the knowledge of the decree is to be regarded as the *terminus a quo*, we think the facts and the circumstances of the case make it abundantly clear that the respondents must have acquired knowledge of the existence of the decree long before 30 days prior to the date of the application. The record shows that in execution of the decree notices were on different occasions issued to the judgment-debtors, the mortgaged property was sold by auction, the objections preferred by certain persons were rejected, and the sale confirmed by the Court in favour of the decree-holder. The property purchased by him was subsequently sold to one Ali Muhammad by a deed dated the 1st of February 1913, who, it is alleged, expended a considerable sum of money on rebuilding and improving it. Now, all these acts took place in Rohtak, the very town wherein the property is situate and the judgment-debtors reside. It is almost inconceivable that in spite of all these proceedings they remained ignorant of the decree against them during a period extending over nearly six years. Conceding that one of the children was major at the time of the suit, it is manifest that she must have known of the decree long before 30 days prior to the date of the application.

For the aforesaid reasons we hold that the application dated the 1st of May 1914 is barred by limitation under article 164

of the Limitation Act of 1908. Setting aside the order of the lower Court, we accept the application for revision with costs in both the Courts.

Revision accepted.

No. 102.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Scott-Smith.*

HAR PARSHAD—(CREDITOR)—PETITIONER,

Versus

BHAGAT SINGH—(DEBTOR)—RESPONDENT.

Civil Revision No. 388 of 1915.

Provincial Insolvency Act, III of 1907, sections (4), (b) and 46 (1)—revision by Chief Court confined to questions of law—whether question of "intention" with which a transfer of property has been made is one of law or fact.

Held, that the Chief Court cannot interfere, under section 46 (1) of the Provincial Insolvency Act, with an order, made by the District Court in appeal, unless it finds that some question of law has been wrongly decided.

I. L. R. 16 All. 476 (F. B.) (1), I. L. R. 27 All. 192 (2) and I. L. R. 21 Bom. 250 (3), referred to.

Held also, that the question as to whether a person made a transfer of his property with intent to defeat or delay his creditors, *vide* section 4 (b) of the Insolvency Act, is not one of law but merely one of fact.

I. L. R. 20 Cal. 93 (99) (P. C.) (4), 2 Cal. W. N. 335 (336) (5), I. L. R. 7 Ch. Ap. 302 (6), 3 Cal. W. N. 255 (260) (7), I. L. R. 21 All. 496 (P. C.) (8), I. L. R. 19 Cal. 253 (262) (P. C.) (9), 8 Cal. W. N. 690 (10), 81 P. R. 1908, p. 386 (11) and 36 P. R. 1899 (12), referred to and distinguished—I. L. R. 36 Mad. 453 (Cr.) (13), referred to.

*Revision from the order of Major A. A. Irvine, District Judge,
Lahore, dated the 12th April 1915.*

Beechey and Ganpat Rai, for Petitioner.

Broadway, for Respondent.

The judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—On 1st October 1914 Seth 27th March 1916.
Har Parshad filed an insolvency petition against his debtor

- (1) (1894) *I. L. R. 16 All. 476 (F. B.) (Sarman Lal v. Khuban).*
- (2) (1904) *I. L. R. 27 All. 192 (McCarron v. Welti).*
- (3) (1895) *I. L. R. 21 Bom. 250 (Poona City Municipality v. Ramji Raghunath).*
- (4) (1892) *I. L. R. 20 Cal. 93 (99) (P. C.) (Ramgopal v. Shams Khaton).*
- (5) (1898) *2 Cal. W. N. 335 (336) (Brijmohun Dobay v. Bungsidhur).*
- (6) (1872) *L. R. 7 Ch. Ap. 302 (In re Wood).*
- (7) (1899) *3 Cal. W. N. 255 (260) (Krishna Kishore Neogi v. Mir Mahomed Ali).*
- (8) (1899) *I. L. R. 21 All. 496 (P. C.) (Beni Ram v. Kundan Lal).*
- (9) (1891) *I. L. R. 19 Cal. 253 (P. C.) (262) (Lachmeswar Singh v. Manowar Hossein).*
- (10) (1904) *8 Cal. W. N. 690 (Girdhar Das v. Ram Autar Singh).*
- (11) *81 P. R. 1908, p. 386 (Lahori Mal v. Ganga Ram).*
- (12) *36 P. R. 1899 (Budha Mal v. Gulab).*
- (13) (1911) *I. L. R. 36 Mad. 453 (Cr.) (In re Jaladu).*

Bhai Bhagat Singh, the "act of insolvency" alleged being the sale by the debtor on 2nd July 1914 of certain property for Rs. 51,000. Of this sum Rs. 40,000 was to be paid to three creditors, who had mortgages on the property sold or part of it, while there is conflict between the parties as to whether the sale-deed contains any provision regarding the remaining Rs. 11,000. The First Court held that no doubt the creditors to be paid out of the sale-money were the secured creditors, but that nevertheless, inasmuch as a secured creditor *may* renounce his security, preference shown to him by the debtor may be an act done with intent to defeat or delay other creditors, and thus an act of insolvency had been done. The Lower Appellate Court held, on the other hand, that the Rs. 40,000 was to be paid in the natural way to the three creditors who had by law the first call on the property, that the deed provided that the remaining Rs. 11,000 was to be paid into Mr. Ganpat Rai's account in the Punjab National Bank, and that no intention to defeat or delay any one had been made out. The application of Seth Har Parshad was therefore dismissed.

This case has been referred to a Division Bench because of the need for an authoritative decision as to whether revision lies, Seth Har Parshad having filed a petition of that nature. After hearing arguments both on this point and on the merits we have arrived at the conclusion that revision is not competent and that on the merits the decision of the lower Appellate Court is in any case reasonable and sound.

Section 46 (1), Provincial Insolvency Act, 1907, in allowing an appeal to the District Court lays it down that the appellate order is final, unless the Chief Court (on revision) finds the District Court's order was "contrary to law." We take this to mean that this Court will not interfere, unless it thinks some "question of law" has been wrongly decided. In the present case the question decided was whether Bhai Bhagat Singh by his sale of 2nd July 1914 actually had in his mind the intention of thereby defeating or delaying his creditors—section 4 (b) of the Act. In our opinion this is not a question of law but merely one of fact.

We have heard much argument on this point. Mr. Beechey contending that the question is one of law, first points out the analogous wording of section 25, Provincial Small Cause Courts Act, and in connection therewith quotes *I. L. R. 16 All. 476 (1)*, *I. L. R. 27 All. 192 (2)* and

(1) (1894) *I. L. R. 16 All. 476 (F. B.)* (*Sarman Lal v. Khuban*).

(2) (1904) *I. L. R. 27 All. 192* (*McCarron v. Welti*).

I. L. R. 21 Bom. 250 (1), as shewing that revision under such a provision as that now before us is a wider thing than revision under the Civil Procedure Code. This may be, but it does not seem to us to help much.

He next quotes authority for the proposition that "intent" in connection with section 4 (b) aforesaid is always a question of law, as the point for decision is whether the transfer of property falls within the clause or not. He relies upon—

I. L. R. 20 Cal. 93 (P. C.), p. 99 (2).

2 *C. W. N.* 335, p. 336 (3).

3 *C. W. N.* 255, p. 260 (4).

I. L. R. 19 Cal. 253 (P. C.) (5).

81 *P. R.* 1908, p. 386 (6).

I. L. R. 21 All. 496 (7).

8 *C. W. N.* 690 (8).

In the first of these cases the Privy Council held that conclusions from facts may be conclusions of law and that in that particular case the conclusion was one of law; the point was whether on a consideration of certain events and acts it should be held that defendant had undertaken a certain obligation. We see but little resemblance between that case and the present, a man may by his acts saddle himself with an obligation without consciously intending to do so, but we cannot see how a man can *intend* to defeat or delay his creditors without consciously intending it, and, if he has the conscious intent, that is a matter, surely, of fact.

The case in 2 *C. W. N.* (3), seems to us irrelevant. It was a case of transfer of the whole of debtor's property, which is, of course, an act of bankruptcy, whatever the intent may have been—see section 4 (a) of the Act. The remark from *In re Wood* * cited at p. 336 seems to us quite outside the question before the Court. In that case Mellish, L. J., pointed out in effect that the bare questions whether a debtor had made a transfer and whether he had done so with intent to defeat or delay creditor, would be left to the jury, but that

* Law Reports
7 Ch. Ap. 302 (9).

(1) (1895) *I. L. R. 21 Bom. 250* (*Poona City Municipality v. Ramji Raghunath*).

(2) (1892) *I. L. R. 20 Cal. 93* (99) (P. C.) (*Ramgopal v. Shams Khaton*).

(3) (1898) 2 *Cal. W. N.* 335 (336) (*Brijmohun Dobay v. Bungsidhur*).

(4) (1899) 3 *Cal. W. N.* 255 (260) (*Krishna Kishore Neogi v. Mir Mahomed Ali*).

(5) (1891) *I. L. R. 19 Cal. 253* (262) (P. C.) (*Lachmeswar Singh v. Manovar Hossein*).

(6) 81 *P. R.* 1908 p. 386 (*Lahori Mal v. Ganga Ram*).

(7) (1899) *I. L. R. 21 All. 496* (P. C.) (*Hien Ram v. Kundan Lal*).

(8) (1901) 8 *Cal. W. N.* 690 (*Girdhar Das v. Ram Autar Singh*).

(9) (1872) *L. R. 7 Ch. Ap. 302* (*In re Wood*).

in the case of a fraudulent conveyance the Court would hold, without letting the jury have a say on the matter, that it was intended to defeat or delay creditors. In the present case the transfer does not seem to us simply on proof of the *factum* to be *ex necessitate* one with such intent.

The case in 3 C. W. N. (1), deals with acquiescence, which was on the peculiar facts held to be a question of law. We are inclined to doubt whether in all cases acquiescence is a question of law, though undoubtedly it may often be so. We do not think that for the purposes of the present case any useful guidance can be got from this ruling, or from I. L. R. 21 All. 496 (2), also a case of acquiescence.

I. L. R. 19 Cal. 253 (P. C.) (3) is a case in which (p. 262) their Lordships ruled that *in that case* the question whether possession was adverse or not was a question of law, but they also remarked that it is often one of simple fact. Mr. Beechey can obtain no support from this authority.

8 C. W. N. 690 (4), need not be seriously discussed, and there remains 81 P. R. 1908 (at p. 386) (5), which was really the cause of this reference to a Division Bench. The point was whether a certain transfer of property was void as being fraudulent. Both the Lower Courts had said it was, and the Chief Court—on a revision under section 70 (1) (b) of the then Courts Act—held that this was a question of law. The Lower Courts, it should be noted, had held that the intention of the parties to the transfer and its obvious consequence was to defeat or delay creditors and that *therefore* the transfer must be regarded as *having no legal validity*. This is not the same question as we have before us here. We have to decide no question of legal validity of the sale of 2nd July 1914, but have only to decide what was the actual intention in the mind of the transferor when he made the transfer. The *dictum* in the ruling must be strictly confined to the circumstances of that case.

Mr. Broadway, on behalf of respondents, quotes many rulings showing the limitations of revision under section 25, Small Cause Courts Act, but mainly relies upon 36 P. R. 1899 (6), a ruling which we are content to follow. The question

(1) (1899) 3 Cal. W. N. 255 (260) (*Krishna Kis'ore Neogi v. Mir Mahomed Ali*).

(2) (1899) I. L. R. 21 All. 496 (P. C.) (*Beni Ram v. Kundan Lal*).

(3) (1891) I. L. R. 19 Cal. 253 (262) (P. C.) (*Lachmeswar Singh v. Manowar Hossein*).

(4) (1904) 8 Cal. W. N. 690 (*Girdhar Das v. Ram Autar Singh*).

(5) 81 P. R. 1908, p. 386 (*Lahori Mal v. Ganga Ram*).

(6) 36 P. R. 1899 (*Budha Mal v. Gulab*).

there was whether a certain transaction had been intended by the parties to be a sale or a mortgage. Ostensibly it was a mortgage, and it was held that the question was not of the construction of the deed, but rather as to the inference to be drawn from the deed and other evidence as regards the intention of parties, and that this was a question of fact. We may also refer to the Criminal Case at *I. L. R. 36 Mad. 453 (1)*, where a misrepresentation as to the "intention" of a person was held to be a misrepresentation of "fact."

We must hold, then, in view of section 46 (1) aforesaid that no revision lies. We need not discuss the case on the merits.

The petition is dismissed with costs.

Revision dismissed.

No. 103.

Before Hon. Mr. Justice Rattigan.

NATHU MAL—(JUDGMENT-DEBTOR)—APPELLANT,

Versus

PALA MAL—(DECREE-HOLDER)—RESPONDENT.

Civil Appeal No. 3324 of 1915.

Execution proceedings under ex-parte decree—whether revived by subsequent decree on the merits.

Held, that applications and proceedings in execution under an *ex-parte* decree become null and void when the *ex-parte* decree is set aside and are not revived when the decree on the merits is passed.

I. L. R. 29 Mad. 175 (2), referred to.*

Miscellaneous first appeal from the order of Lala Achhru Ram, District Judge, Gujrat, dated the 23th January 1914.

Mukand Lal, for Appellant.

Nanak Chand, for Respondent.

The judgment of the learned Judge was as follows:—

RATTIGAN, J.—On the 29th May 1906 Pala Mal obtained an *ex-parte* decree for Rs 515 and costs. The same day he applied in ordinary manner for execution, but the application was eventually consigned to the record room. On the 1st of October 1906 the judgment-debtor applied to have the *ex-parte* decree set aside and the application was granted on the 6th of October, and on the 23rd October a decree in favour of Pala Mal was passed on the merits. Prior to this there had

29th March 1916.

(1) (1911) *I. L. R. 36 Mad. 453 (Cr.)* (In re *Jaladu*).

(2) (1905) *I. L. R. 29 Mad. 175* (*Chettiattil Muhamod v. Kunhi Koru*).

been an application for attachment and sale of the judgment-debtor's property and on the 27th of August 1906 an order for sale had been passed. By a subsequent order, proceedings were directed to be stayed until disposal of the judgment-debtor's application to have the *ex-parte* decree set aside. On the 23rd October 1906, immediately after the decree had been passed in his favour, the decree-holder is said to have made an oral application for the sale of the property which had been attached under the previous *ex-parte* decree. After this various orders for sale were made and set aside; and on the 8th of April 1911 a fresh application for execution was filed, but as no property was forthcoming, the application was consigned to the record room on the 22nd of April 1911. Finally, the present application for execution was presented to the Court on the 11th of January 1913, and the plea of the judgment-debtor is that the application is time-barred, inasmuch as the previous application of the 8th of April was also barred by time.

As a matter of fact, there has been no application for execution of decree (complying with the terms of section 235 of the Civil Procedure Code, 1882), presented to the Court since the *ex-parte* decree was set aside, and Mr. Nanak Chand's contention on behalf of the respondent is that the applications and proceedings that took place under the former *ex-parte* decree were all revived and continued when the decree on the merits was passed on the 23rd of October 1906.

With this contention I cannot agree and the decision of the Madras High Court in *I. L. R. 29 Mad. 175 (1)* supports the view that all the previous applications and proceedings became null and void when the *ex-parte* decree was set aside and that they were not revived when the decree on the merits was passed.

Upon this view of the case it is clear that the present application for execution is time-barred, and I accordingly accept this appeal and reject the decree-holder's application for execution. Respondent must pay costs throughout.

Appeal accepted.

No. 104.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr.
Justice LeRossignol.

MUNICIPAL COMMITTEE, AMBALA—(DEFENDANT)—
APPELLANT,

Versus

MADAN LAL—(PLAINTIFF)—RESPONDENT.

Civil appeal No. 1010 of 1915.

Punjab Municipal Act, II of 1911, section 175—suit to challenge action of Municipal Committee—whether competent—power of Committee to direct removal of projections on public street after having sanctioned its erection.

The Municipal Committee first sanctioned the erection by plaintiff of a verandah on a *chaubutra* lying in front of his house and afterwards required him to demolish it. The plaintiff then sued for an injunction against the Committee. The District Court held that the action of the Committee was not tainted with *mala fides*, but held that it was unreasonable and *ultra vires*.

Held, by the Chief Court, that persons dissatisfied with the action of a Committee have a right of appeal, but not to a Civil Court, which can interfere only when the act complained of was in excess of the powers of the Committee and has no concern with the question whether such action was reasonable or not.

Held also, that on it being discovered that the site under the *chaubutra* was not the property of the plaintiff and was therefore part of the public street, the verandah built on it was overhanging the street and the Committee was under section 175, Punjab Municipal Act, justified in requiring it to be demolished on payment of reasonable compensation.

52 P. R. 1900 (1), distinguished.

Second appeal from the decree of A. W. J. Talbot, Esquire, District Judge, Ambala, dated the 30th January 1915.

Bahadur Chand, for Appellant.

Gokal Chand Narang, for Respondent.

The judgment of the Court was delivered by—

LEROSSIGNOL, J.—The question in this case is, whether the Municipal Committee, Ambala, having on the 18th March 1912, sanctioned the erection by plaintiff of a verandah on a *chaubutra* lying in front of his house, is now justified in requiring him to demolish it. 29th March 1916.

Its action is justified by the Committee by reference to section 175 of the Municipal Act of 1911.

The District Judge found that the action of the Committee was not tainted with *mala fides*, but held that it was unreasonable and *ultra vires*.

The Committee, of course, tendered compensation to the plaintiff and there is no issue as to the adequacy or otherwise of the sum tendered.

Whether the action of the Committee was reasonable or not seems to us to be a matter with which the Civil Courts have no concern.

Persons dissatisfied with any act of a Committee have a right of appeal, but not to a Civil Court, which will interfere only when the act complained of is in excess of the powers of the Committee.

The District Judge whilst holding that section 175 appears to justify the Committee's action, holds that 52 P. R. 1900 (1) negatives that view, inasmuch as the provisions of the Act of 1891, which was in force when 52 P. R. 1900 (1) was decided, are reproduced without modification in the Act of 1913.

This is however not the case. Section 95 of the Act of 1891 made provision for the demolition on payment of compensation of encroachments lawfully in existence at the commencement of the Act but did not consider the case of encroachments which had come lawfully into existence after the commencement of the Act. Section 175 of the present Act on the contrary is very wide in its terms and empowers the Committee to remove any encroachment or projection on payment of compensation, if it is not justified in taking action summarily under section 173 of the same Act.

Now it has been found that though the material of the *chaubutra* on which the verandah has been erected is the property of the plaintiff, the site is not his property and it must therefore be part of a street and the property of the Municipal Committee. Consequently the verandah overhangs the street and its demolition falls within the purview of section 175 of the Act.

Before us it has been argued that even if the site is not the property of plaintiff, it does not follow that it is Municipal property, but the contest from the beginning has been waged on that hypothesis and the plan on the record indicates that if the site is not the plaintiff's property it is a part of a street.

We accordingly accept the appeal and, setting aside the decree of the Court below, dismiss the suit with costs throughout.

Appeal accepted.

No. 105.

Before Hon. Mr. Justice Shadi Lal, and Hon. Mr. Justice
LeRossignol.

GHULAM NABI—(PLAINTIFF)—APPELLANT,

Versus

MOHKAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 784 of 1913.

Custom—Alienation—after born son—whether bound by ratification by nearest collateral made after the son's birth.

One H. sold a plot of land on 22nd August 1904. Plaintiff, a son of H. who was born on the 7th June 1905, sued for possession of it. One M., a cousin of H. who was in existence at the time of the sale, on the 20th July 1905 brought a suit for pre-emption in respect of the sale. It was contended by defendant-vendee that by this ratification by M. plaintiff had lost his rights.

Held, that plaintiff's right to challenge the sale was not affected by the ratification of M. as it took place "after" plaintiff's birth.

55 P. R. 1903, (F. B.) (1), referred to.

Second appeal from the decree of Rai Bahadur Bhagat Narayan Das, Ahluwalia, Divisional Judge, Shahpur Division at Sargodha, dated the 10th January 1913.

Devi Dial, for Appellant.

Nand Lal, for Respondents.

The judgment of the Court was delivered by—

SHADI LAL, J.—This is a suit by the plaintiff, Ghulam Nabi, for possession of a plot of land sold by his father, Haidar, on the 22nd August 1904 to one Raja. It is indisputable that the plaintiff was born on the 7th of June 1905, more than 9 months after the date of the alienation, and ordinarily he would not be entitled to contest the alienation, which was made before his birth. But it appears from the evidence of the Office Kanungo that the property in suit is ancestral *qua* Mohkam, a cousin of the alienor, who was in existence at the date of the transfer and had consequently a right to impeach the sale. 1st April 1916.

The learned Divisional Judge holds that Mohkam ratified the sale by bringing a suit for pre-emption with respect thereto, but the suit was instituted on the 20th July 1905, after the birth of the plaintiff, and the ratification made at that time does not have the effect of destroying the plaintiff's right, which vested in him at his birth. The rule laid down by the majority of the Full Bench in No. 55 P. R. 1903 (1) is to the

24th || effect that an after-born son is competent to challenge an alienation, if there was in existence at the date of the transfer some one who was entitled to challenge it, and who did not ratify it before the after-born son was begotten. As pointed out above, the ratification in question took place after the birth of the plaintiff, and under the ruling referred to above the plaintiff has a right to contest the alienation. The Divisional Judge is, accordingly, wrong in dismissing the suit *in limine*.

[The remainder of the judgment is not required for the purpose of this report.—Ed.]

Appeal dismissed.

No. 106.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Scott-Smith.*

SHIB DIAL AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

INDAR SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 43 of 1914.

Pre-emption—rival pre-emptors—consent to sale by one set of pre-emptors—complete waiver—proof of consent.

Held, that consent to the sale by one set of rival pre-emptors is a complete waiver and lets in any rival pre-emptor who may come forward.

42 P. R. 1878 (1), referred to.

Held also, that the consent in this case had been sufficiently established by one of the set aforesaid having attested the deed of sale and joined in the registration, by that set suing together and after another pre-emptor had instituted his suit, and by the direct evidence of witnesses, etc.

25 P. R. 1903 (2) and 48 P. R. 1912 (3), referred to.

100 P. R. 1885 (4), 7 P. R. 1912 (5) and 139 P. R. 1894 (6), distinguished.

First appeal from the decree of C. F. Strickland, Esquire, District Judge, Kangra, dated the 16th October 1913.

Gokal Chand Narang, for Appellants.

C. Bevan-Petman, for Respondents.

The judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—This is a dispute between rival pre-emptors mainly. The vendor is Ram Dial, defendant

3rd April 1916.

(1) 42 P. R. 1878 (*Nabbi Bakhsh v. Kaka Singh*).

(2) 25 P. R. 1903 (*Nabi Bakhsh v. Fakir Muhammad*).

(3) 48 P. R. 1912 (*Fatch Chand v. Kirpa Singh*).

(4) 100 P. R. 1885 (*Shah Bodhraj v. Sundar Singh*).

(5) 7 P. R. 1912 (*Mahmud Bakhsh v. Hassan Bakhsh*).

(6) 139 P. R. 1894 (*Brij Nath v. Jita*).

and the vendee Rai Sahib Amar Singh. Indar Singh claims pre-emption in one case and the group Shib Dial, Lehn and Sawan Singh in the other. The stated sale price is Rs. 17,300, whereof Rs. 14,000 represents the mortgage lien of Indar Singh, who denounces the additional Rs. 3,300 as fictitious, while the other pre-emptors offer to pay it.

The pleadings are set forth in the lower Court's judgment. The first issue was found against Indar Singh, and the point has not been taken again in argument before us and may therefore be ignored. The other issues are clear and explain the pleadings :—

2. Did defendants Shib Dial, etc., agree to the sale in favour of Rai Sahib Amar Singh ?

3. Did Indar Singh refuse to buy ?

4. As to costs.

5. Another matter not agitated before us and requiring no comment.

The findings were that Shib Dial and his fellows agreed to the sale to Amar Singh and so were barred. As to costs the order was that Indar Singh's and Amar Singh's cost should be paid by the vendor and the rival pre-emptors, in case Indar Singh acted on the decree and paid Rs. 3,300 within one month.

The rival pre-emptors have appealed (First Appeal 43 of 1914), denying waiver by them both, in fact and in law, and also urging that the order as to costs is unjust. Ram Dial, vendor, has also appealed (First Appeal 82 of 1914) against the order as to costs.

In our opinion Indar Singh has successfully proved that the rival pre-emptors not only agreed to the sale to Amar Singh, but did so with the intention of defeating his (Indar Singh's) claims—in fact, that there was a plot to keep Indar Singh out. To prove this Indar Singh has —

(a) The signature of Sawan Singh, one of the rivals, on the sale-deed itself, as attesting witness, and again at registration ;

(b) The fact that Indar Singh sued first (16th January 1913), and afterwards the others sued (6th February) ;

(c) The admission of P. W. 6 Sawan Singh that he signed the sale-deed, and the circumstance that his party never asked him why or with what intention he signed so as to give him an opportunity to explain ;

(d) The evidence of five other witnesses as to the negotiations that led up to the execution of the sale-deed.

That evidence appears to us to be very strong and convincing. Though technically perhaps the signature of Sawan Singh would not bind his fellows, that signature not only binds Sawan Singh but renders it easy to accept the apparently disinterested oral evidence that all three persons were at one in agreeing to the sale to Amar Singh, especially as the three have shown their solidarity by suing jointly. That evidence has not been seriously criticised in argument. The suggestion that Sawan Singh signed in his official capacity as Lambardar does not impress us, nor does the contention that the witnesses are probably suborned because they do not belong to Palampur where the negotiations were had and the deed was written and executed and registered. Indar Singh himself does not belong to Palampur, but to Rani Sidhpur. The negotiations were conducted for days at the *Arya Samaj* house at Palampur, and we see nothing strange in P. W. 1 and 2, the Lambardars of a village only half a *kos* away, and P. W. 3, a respectable contractor of that same village, being present. Then there is P. W. 4 (of Rani Sidhpur) and P. W. 5 (of Bawarna). It was natural for Indar Singh, on making his enquiries, to select as his witnesses respectable and responsible men who he found were acquainted with the facts. (The learned District Judge, it may be noted, makes a slight mistake in saying that P. W. 2 says Lehnua was not there). The details of the plot are not given in precisely the same way by all the witnesses, but this is natural enough and in no way reduces the value of the evidence. It is said, *inter alia*, that Rs. 700 was to be paid out of the Rs. 3,300 to Sawan Singh on account of a debt due to him from the vendor.

In these circumstances the legal aspect of the case requires little discussion. We have been referred to a large number of rulings on the subject of waiver of right of pre-emption. No authority is required to shew that direct waiver bars the party making it. Here we find as a fact that Shib Dial, Lehnua and Sawan Singh agreed to the sale to Amar Singh, thus waiving their own right to pre-empt as against him. 42 P. R. 1878 (1) is sufficient authority to shew that such conduct implies a complete waiver and lets in any rival pre-emptor who may choose to come forward. 25 P. R. 1903 (2) is a case on all fours with the case of Sawan Singh here, for there too the would-be pre-emptor had attested the deed and joined in

(1) 42 P. R. 1878 (*Nabbi Bakhsh v. Kaka Singh*).

(2) 25 P. R. 1903 (*Nabi Bakhsh v. Fakir Muhammad*).

the registration; and 48 P. R. 1912 (1) is also strongly in favour of Indar Singh.

In the face of these rulings and of the facts it is idle to quote such cases as 100 P. R. 1885 (2) (petition-writer drawing up deed of sale and then suing for pre-emption), 7 P. R. 1912 (3) (a son not being bound by his father's waiver), 139 P. R. 1894 (4) (standing by, not amounting to waiver), and so on.

As regards costs we cannot see why the vendor should pay Amar Singh's costs. If there was a plot, Amar Singh was fully cognizant of it and lent himself to it; but vendor is certainly liable for Indar Singh's costs.

For these reasons we dismiss this appeal (43) with costs, and partially accept vendor's appeal (82).

Appeal dismissed.

No. 107.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Shadi Lal.*

NIDHAN—(DEFENDANT)—APPELLANT,

Versus

BUTA AND OTHERS—(PLAINTIFFS)—MUSSAMMAT ISHRI
—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 1506 of 1913.

Second appeal—on points of acquiescence and necessity—delay—proof of acquiescence—quantum of proof of necessity after long lapse of time.

Held, that acquiescence is sometimes a pure question of fact, *e.g.*, when the point is to be decided solely on the allegation that the party positively and in set terms gave consent, but it is a question of law when the point is whether conduct of the party, not amounting to direct consent, should be taken as waiver.

Similarly "necessity" may be a question of fact, *e.g.* when the point is whether a sum of money was taken to the knowledge of the alienor to pay a previous genuine debt or *per contra* merely as an act of wanton extravagance, but when the point raised is whether the Court below has infringed rules and maxims laid down by the Chief Court and has decided on wrong principles as to the quantum of proof of necessity required, then the question is one of law.

61 P. L. R. 1901 (1), referred to.

Held also, that mere delay in suing was not sufficient to prove acquiescence but that the Lower Appellate Court had overlooked the principle

- (1) 48 P. R. 1912 (*Fateh Chand v. Kirpa Ram*).
- (2) 100 P. R. 1885 (*Shah Bodhraj v. Sundar Singh*).
- (3) 7 P. R. 1912 *Mahmud (Bakhsh v. Hassan Bakhsh)*.
- (4) 139 P. R. 1894 (*Brij Nath v. Jita*).
- (5) 61 P. L. R. 1901 (*Muhammad Bakhsh v. Gahna*).

laid down by the Chief Court that liberal allowance is to be made to alienees in the matter of *quantum* of proof of "necessity" where many years have elapsed since the events in question took place and that the appeal must be accepted on this point.

Second appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Sialkot Division, dated the 3rd April 1913.

Govind Das, for Appellant.

Muhammad Sharif, for Respondents.

The judgment of the Court was delivered by—

11th April 1916.

SIR DONALD JOHNSTONE, C. J.—Plaintiffs, as reversionary heirs of the late Jiwan Singh have sued for possession of 214 *kanals* 5 *marlas* of land owned by him. Jiwan Singh died as long ago as November 1901. Before he died, he made a gift to defendant 1, his daughter, which was vainly contested by the plaintiffs, *vide* Chief Court judgment of 19th October 1906. When he died, he appears to have owned some 240 *kanals* of land, whereof half had been mortgaged on 27th June 1889 to Jaidiyal, defendant 3, and about half on 28th June 1900 for Rs. 600 to Nidhan, defendant 2, Jiwan Singh's widow Chandan, who succeeded on his death, having further mortgaged this second half to Nidhan, defendant 2, for Rs. 396 on 11th June 1902. By their claim plaintiffs contest defendant 1's pretension to be preferred to them as an heir, and also denounce all three mortgages as being without consideration and "necessity."

The learned District Judge found plaintiffs had a better right than defendant 1, but upheld defendant 3's mortgage *in toto* and defendant 2's first mortgage to the extent of Rs. 405-15-0, whereupon plaintiffs appealed regarding both mortgages, defendant 1 regarding her claim as against plaintiffs, and defendant 2 as regards so much of his mortgages as had been disallowed. The Lower Appellate Court has dismissed defendant 1's appeal without costs, and has dismissed plaintiff's appeal against defendant 3 with costs, but has decreed plaintiff's appeal in full against defendant 2 with costs, holding that neither of his mortgages were with "necessity."

Defendant 2 alone has appealed, so that we are not concerned with defendant 1 or defendant 3. The memorandum of appeal contains four paragraphs, but Mr. Govind Das gives up No. 1 (plaintiffs having no *locus standi* in presence of defendant 1) and No. 3 (time bar). He relies upon No. 2 (that "necessity" is proved) and No. 4 (that plaintiffs acquiesced in the alienations to defendant 2).

Plaintiffs object that these two matters are in the circumstances merely questions of fact and so no second appeal

lies; but we cannot accede to this contention. Acquiescence is sometimes a pure question of fact, *e. g.* when the point is to be decided solely on the allegation that the party positively and in set terms gave consent; but it is a question of law when the point is whether conduct of the party, not amounting to direct consent, should be taken as waiver; *Cf.* 61 *P. L. R.* 1901 (1). Similarly, "necessity" may be a pure question of fact, *e. g.* when the point is whether a sum of money was taken, to the knowledge of the alienee, to pay a previous genuine debt, or *per contra* merely as an act of wanton extravagance; but when the point raised is whether the Court below has infringed rules and maxims laid down by this Court and has decided on wrong principles as to the *quantum* of proof of "necessity" required, then the question is undoubtedly one of law; see again 61 *P. L. R.* 1901 (1).

As regards acquiescence, however, we cannot see that defendant 2 has made out his point. We know of no authority under which we could hold that a plaintiff, having by law 12 years within which to sue for possession of land and waiting for 7 years from the time when his right to possession accrues, has waived his rights merely by reason of such delay; nor are we inclined to adopt such a finding as that. Mussammat Chandan, widow of Jiwan Singh, died in October 1904, and the suit was brought in June 1911.

But as regards "necessity" we feel constrained to give defendant 2 relief. Defendant 2's counsel does not press for reconsideration of the disallowance of the sum of Rs. 194-1-0 in his earlier deed, the passing of which had admittedly not been proved; but it seems to us that all the other items have been sufficiently proved both as regards their passing and their "necessity." It has been repeatedly laid down by this Court that liberal allowance is to be made to alienees in the matter of *quantum* of proof of "necessity" where many years have elapsed since the events in question took place; and it seems to us that the lower Appellate Court has overlooked this principle in the present case in which the alienations took place in 1900 and 1902 and the suit was filed in June 1911. We see no reason to doubt the *bona fides* of Jiwan Singh, though he raised Rs. 600 of loans in 9 months in 1899-1900, while Mussammat Chandan's need for money in 1902 is clear enough, considering that she had hardly any unencumbered land whatever and that a considerable part of

(1) 61 *P. L. R.* 1901 (*Muhammad Bakhsh v. Gahna*).

the mortgage money of 1902 consisted of debt of the time of her late husband.

For these reasons we accept defendant 2's appeal, set aside the judgment and decree of the lower Appellate Court as regards him, and restore the decree of the first Court. Plaintiffs will pay defendant 2's costs here and in lower Appellate Court.

Appeal accepted.

No. 108.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Scott-Smith*

MUNICIPAL COMMITTEE, KARNAL—(DEFENDANT)—
APPELLANT,

Versus

MUHAMMAD RUSTAM ALI KHAN AND OTHERS —
(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 461 of 1913.

Punjab Municipal Act, III of 1911, section 3 (13). (b)—definition of "street" and "public street"—presumed dedication of a road to the public—Indian Limitation Act, 1877, section 26.

Where it was found as a fact that the predecessors of the plaintiffs built a market of shops, known as the Nawab Ganj, with an open space lying between the shops opening into thoroughfares at various points and they then let the shops to grain dealers and the vacant space or part of it had been ever since used by all members of the public who came in to buy and sell grain and by carts bringing in grain without interruption of any kind.

Held, that there was a presumption that they intended the members of the public to make use of the space left vacant or a part of it as a highway and that the *onus* was on the plaintiffs to show that the user was only permissive or that the dedication was limited to a particular class of persons, which *onus* they had failed to discharge.

62 P. R. 1898 (1) (and reference therein made to the *dictum* of Chamber J. in *Woodyer v. Hadden*, 5 Taunt 12) 6 Cal. L. R. 282 (2), I. L. R. 30 Bom. 558 (567, 568) (3), I. L. R. 32 M d. 527 (4), 8 Indian Cases 175 (5), I. L. R. 33 Cal. 1290 (1296) (6), referred to.

I. L. R. 6 Bom. 686 (7), I. L. R. 20 Bom. 146 (8) and 25 W. R. 233 (9), distinguished.

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- (1) 62 P. R. 1898 (*Rana Ganpat Singh v. Kangra Valley Slate Coy.*).
 - (2) (1880) 6 Cal. L. R. 282 (*Anderson v. Juggodumba Dabi*).
 - (3) (1906) I. L. R. 30 Bom. 558 (537, 568) (*Municipal Commissioner, Bombay v. Mathurabai*).
 - (4) (1909) I. L. R. 32 Mad. 527 (*Mannada Mudali v. Nallaya Gounden*).
 - (5) (1910) 8 Indian Cases 175 (*Vibudapriya v. Esoof Sahib*).
 - (6) (1906) I. L. R. 33 Cal. 1290 (1296) (*Chairman of Howrah Municipality v. Khetra Krishna*).
 - (7) (1882) I. L. R. 6 Bom. 686 (*Kalidas v. Municipality of Dhandhuka*).
 - (8) (1894) I. L. R. 20 Bom. 146 (*Ahmedabad Municipality v. Manilal*).
 - (9) (1876) 25 W. R. 233 (*Sham Soonder v. Monee Ram Doss*).

Held also, that the fact that several of the exits from the market were provided with gates, which used to be shut at night for protective purposes only, made no difference and did not shew that the plaintiffs' predecessors reserved to themselves the right of closing the market at pleasure.

Held consequently, that the Municipal Committee was justified in making a metalled road on the vacant space, 10 feet wide, which it was not urged was an unreasonable width.

First appeal from the decree of Sardar Ali Hussain Khan, Kaziabash, District Judge, Karnal, dated the 23rd December 1912.

*Ans ruled by
1 Lahore*

C. Bevan Petman, for Appellant.

Kirkpatrick and Muhammad Shafi, for Respondents.

The judgment of the Court was delivered by —

SCOTT-SMITH, J.—The plaintiffs in the present case are 12th April 1916.
Nawab Bahadur Rustam Ali Khan and Nawab Umar Daraz Ali Khan of Karnal and the Municipal Committee of Karnal is the defendant. The dispute between the parties is in reference to a metalled road which the defendant Committee made in the Nawab Ganj, a grain market situate in a suburb of the city of Karnal, and owned by the plaintiffs. There is a plan of Nawab Ganj on the record which shows the position of the road in question. The Nawab Ganj was built by the plaintiffs' ancestors. It consists of two rows of shops with a vacant space lying between. The shops are occupied by the tenants of the plaintiffs who deal in grain and other commodities. On the vacant site lying between the shops there are *tharas* on which the shop-keepers store grain. There is a good deal of vacant space which is not occupied by *tharas*, carts bringing in grain pass along the vacant space and so do the members of the general public who come to buy grain. There are five gate-ways in the Nawab Ganj: No. (1) at the extreme north is called the Golakh Gate; it leads into a *bazar*; No. (2) the Telian Gate at the extreme south end of the market; No. (3) leads into the *bazar* from the Pansar Hatta on the east side; No. (4) leads into the same *bazar* at the north-east corner through the Halwai Hatta; and No. (5) leads into the Korianwala Serai and is immediately south of the Golakh Gate No. (1).

The road which the Committee has metalled is ten feet wide and leads from the Golakh Gate south to the Korianwala Gate. Two-thirds of the way towards Korianwala Gate it turns east and again after some distance turns due south and leads as far as the Telianwala Gate. It does not take up the whole of the vacant space between the *tharas* but only a part

of it. It is in evidence and it is admitted by the defendant that there were gates at gateways 1, 2 and 4 which used to be closed at night for protective purposes. There never was a gate apparently at No. 3. The gate at No. 5 which leads into the Korianwala Serai is the subject of a connected appeal which is disposed of by a separate judgment.* It is sufficient to state at this place that the evidence shows that the gate at No. 5 used also to be closed at night until a period variously stated at 5 or 10 years ago when it fell down. The plaintiffs brought the present suit in consequence of the action of the Municipal Committee in metalling the road. They sued for possession of the land so taken up and for Rs. 1,000 on account of damages. The lower Court has held that the site under the road belongs to the plaintiffs and that it is not a public street within the meaning of section 3 of the Punjab Municipal Act. It, therefore, decreed the claim to the site under the road but dismissed that for damages. The Municipal Committee, as defendant, has filed an appeal to this Court and the appeal has been argued at very great length before us.

The Nawabs charge the shop-keepers in the *mandi* a fixed rent for their shops. They also levy upon them a cess or tax called *chungi teh bazari*. On behalf of the plaintiffs the contention is that this charge is made for use of the vacant space in front of the shops on which the grain-dealers frequently store their grain. The first question which we shall deal with is whether this *chungi* was charged for use of the vacant site. The lower Court in its judgment refers to Exhibits P. E., P. F., P. I., P. G. and P. H. as shewing that this *chungi* was charged for use of the vacant site lying between the shops. In our opinion it has misinterpreted these exhibits.

Exhibit P. E is printed at pages 19-23 of the paper-book. The heading is "a translation of an extract from the registers relating to the income of sites lying between shops in "Nawab Ganj" and so on. Mr. Petman urges that this heading is merely an invention of the copyist and that the real entry begins at the words "dated Saturday" and so on. Mr. Kirkpatrick admits the correctness of this statement and says that he lays no stress upon the heading. The extract itself refers to the *chungi* and says nothing about sites.

P. F (page 39 of the paper-book) is a copy of a judgment in a suit brought by the present plaintiffs to recover a certain sum on account of a lease of the *chungi* dues.

P. I at page 42 is the judgment on appeal. This judgment shows that *chungi* is charged on all grain brought into the *mandi* and is not a charge for rent of the site as such.

Exhibit pages 25-9 at pp. 46 and 47 of the paper-book consists of two lists of bids offered at auction sales relating to the lease of *chungi* dues.

Exhibit P. G. comprises the plaint and the judgment in a Civil suit. In the plaint, at page 63, the Nawabs clearly state "Besides rent of the shops, we charge as rent one and-a-half *chataks* per maund on goods received for being sold in the "Nawab Ganj. The rent is known by the name of *chungi Teh Bazari*." At page 66 of the paper-book there is a translation of a lease, dated 31st March 1907, executed by one Tulsī in favour of the plaintiffs. This is a lease in respect of *Teh Bazari* of shops at Nawab Ganj and Azmat Ganj. It shows that the *Teh Bazari* consists of dues realised on goods of all sorts brought into the *mandi* from out-stations.

The same thing appears in the lease dated the 1st April 1908, printed at pp. 78 and 79 of the paper-book.

Some of the witnesses produced by the plaintiffs no doubt say that this *chungi Teh Bazari* is realised as rent of the vacant site in the *mandi*, but their evidence to this effect is not borne out by the documentary evidence.

P. Ws. 3, 6, 7, 8, 9 and 10 all state clearly that the *chungi* is a cess paid on grain brought into the market and this is not now denied on behalf of the plaintiffs. Fallon's Hindustani Dictionary gives two meanings of *Teh Bazari*; (1) ground rent of a stall in a market; and (2) a cess levied from vendors in a market.

In our opinion it is clearly established by the evidence on the record that the *chungi Teh Bazari* levied by the Nawabs is levied as a cess on all grain brought into the *mandi* whether such grain is stored in the godowns behind the shops, or in the shops themselves, or on the *tharas*, or on the vacant site. We do not consider that there is any evidence that it is charged for use of the vacant site. In our opinion the levy of this charge does not help the plaintiffs in any way.

The next question is whether any road or passage existed in Nawab Ganj before the Municipal Committee made the metalled road in question. A letter dated 20th May 1842 (page 3 of the paper-book) was referred to by Mr Petman. It appears to shew that in those days there was a road leading from west to east after one passed into the Ganj through the Telianwala Gate. That road is not apparently any part of the site now in dispute and the letter in question does not in our opinion assist either side. The following documents were also referred to by Mr. Petman :—

P. 6 (page 29 of the paper-book) dated 5th August 1890. This was a *murasila* addressed by the President of the Municipal Committee to the Nawabs asking them to repair the drain at Gate No. 1 and to have the ground there cleaned up.

P. 11 (page 34 of the paper-book). Thin was a *murasila* dated 10th August 1898, sent by the President, Municipal Committee, to one of the Nawabs asking him to level the way in the grain market as the public was put to much inconvenience by its muddy state.

P. 15 (page 44 of the paper-book). This was a *murasila* dated 29th July 1902, addressed by the President, Municipal Committee, to one of the Nawabs asking him to make certain arrangements in regard to the well in the Ganj and also asking him to pave the road in the market with concrete.

P. 17 (page 59 of the paper-book). This was a *murasila* dated the 15th August 1906 from the President of the Municipal Committee to one of the Nawabs asking him to make the road in the Ganj *pucca*. On this there is an endorsement to the effect that the road should be repaired.

P. 18 (p. 60 of the paper-book) is the resolution of the Municipal Committee in consequence of which the *murasila* p. 17 was sent to the Nawabs.

In P. 21 page 62 of the paper-book on the 4th September 1906 the Nawabs were reminded of a previous letter about the construction of a metalled road in the grain market. To this a reply was sent on the 17th February 1907 that a metalled road had been constructed in the grain market.

It is contended by Mr. Petman that these documents show that there was some sort of road in the Nawab Ganj even before the Municipal Committee made the metalled road in dispute. It is clear that the Committee was constantly asking the Nawabs to make the road *pucca* and that the Nawabs agreed to do this and eventually said that they had done it. Further the plaintiffs' witnesses all admit that carts laden with grain come into the Nawab Ganj from Gate No. 1, and therefore it is *prima facie* probable that there was some sort of a road even though it may not have been well defined. The defendant's witnesses, many of whom are very respectable people, say that there was a *kucha* road where the *pucca* one has now been made.

D. W. 2 Lala Chuni Lal, Sahukar, says at the place where the Municipality has made the *pucca* road in question there used to be a *kacha* road previously. It was used as a road.

D. W. 3 Najm Din, Octroi Superintendent of the Municipal Committee, has made a similar statement.

D. W. 4 Sayad Abdulla Shah, Conservancy Darogha, supports D. Ws. 2 and 3.

D. W. 5 Mr. Ram Chander, Barrister-at-Law, says that he frequently passed through the Nawab Ganj by the *kacha* road which previously existed where the *pucca* road now is. He is a perfectly independent witness and we see no reason for disbelieving him.

D. W. 6 Pandit Tek Chand, contractor of Karnal and D. W. 7 Pandit Basant Lal, Pleader, are two more disinterested witnesses who depose to the existence of this *kacha* road.

A good many other witnesses were produced, but it is not necessary to reproduce their evidence in detail. In our opinion it is clearly proved that there was a *kacha* road in the Nawab Ganj occupying approximately the situation of the *pucca* road now in dispute. It is obvious that there must have been some such road for the numerous carts laden with grain which came into the *mandi* and discharged their grain at the different shops. Without a road of some kind business could not have been carried on.

Before coming to the legal points we must refer to one or two matters which Mr. Petman has brought to our notice. The first is the matter of lanterns which it is said were put up by the Municipal Committee for the lighting of the *mandi*. Ahmad Hussain, P. W. 12 (p. 79 of the paper-book) has given evidence about these lanterns. He says that one was put up at the instance of Mir Yusaf Ali, a member of the Municipal Committee. It was put up near the staircase of the Mir Sahib's house. It is clear that this lantern was put up by the member of the Committee for his own convenience. Another lantern was set up near Pansar Hatta. The object of this probably was to light the way into the *mandi* which opens into the *bazar*. It is not improbable that this lantern was also put up for the convenience of this member of the Municipal Committee when coming home at night. There is no evidence that the *mandi* was properly lit by the Municipal Committee and the putting up of these two lanterns does not prove that the place was a public one.

The next matter referred to is that of some vegetable sellers who used to squat on the vacant space and sell their vegetables. The documents marked D—8 at pages 140—142 of the paper-book show that the Committee at the instance of the Deputy Commissioner passed orders that after the 1st

October 1909 no one should be allowed to wash or clean vegetable and fruit at any other place in the *mandi* except at a platform specially set apart for that purpose. From this document it also appears that Nawab Rustam Ali Khan set aside some shops specially for these vegetable sellers. All that these documents show is that the Committee purported to act under section 96 of Act XX of 1891, the Punjab Municipal Act, and that the Nawabs raised no objection. What appears to have happened is that they made suitable arrangements for the vegetable sellers in consultation with the Deputy Commissioner. The fact that they raised no objection to the action of the Municipality and of the Deputy Commissioner does not in our opinion affect the question in dispute before us. The Lower Court has held that the site under the road in dispute belongs to the Nawabs. The Municipal Committee admits that the whole of the land inside Nawab Ganj belonged originally to the Nawabs. Their contention is that the road which they have now metalled is a public street within the meaning of section 3, sub-section 13, clause (b) of Act III of 1911. The definition of "street" in section 3, sub-section 13, clause (a) is as follows:—"Street" shall mean any road, footway, square, court, alley or passage, "accessible whether permanently or temporarily, to the public, "whether a thoroughfare or not."

Now we think that there can be no doubt that the vacant space lying between the shops in Nawab Ganj comes within this definition. It is accessible to the public because any member of the public who wishes to buy or sell grain or to make any enquiries of the shop-keepers or to go there for any purpose whatsoever can go in. There is no evidence that anybody has ever been prevented or that any one wishing to enter is asked what his business is.

Now coming to section 3 (13) b, we find that a public street means "any street over which the public has a right of way." Mr. Petman contends that the public has a right of way over the roadway in question and in support of his contention has cited *inter alia* the following authorities.

62 P. R. 1898 (1). In this case it was held that the principles of the English law regarding the presumed dedication of a road to the public arising from user of such road by the public, being founded on reason and common sense and conducive to public convenience, are applicable to India. Further that the user of a road by the public, openly and as of right, is

(1) 62 P. R. 1898 (*Rana Ganpat Singh v. Kangra Valley Slate Coy.*).

sufficient, apart from the law laid down in the Limitation Act, 1877, section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive use. At p. 217 of the *Record* the dictum of Chamber, J. in *Woodyer v. Hadden*, 5 Taunt 12, was quoted as follows:—"No particular time is necessary for evidence of a dedication. If the act of dedication is unequivocal it may take place immediately. For instance, if a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses that is instantly a high-way." We consider this quotation to be very much in point in the present case. Here the predecessors of the Nawabs built a market of shops with an open space lying between the shops, this open space opening into thoroughfares at various points. They then let the shops to grain-dealers and the presumption certainly is that they intended the members of the public to make use of the space left vacant as a high-way. Accordingly we find that the vacant space has ever since been used by all members of the public who come in to buy and sell grain and by carts bringing in grain without interruption of any kind whatsoever.

In 6 *Calcutta L. R.*, p. 282 (1), the English presumption in regard to dedication from user was held to govern a case from the *mofassil* in Bengal.

The next case quoted by Mr. Petman is *I. L. R.* 30 *Bom.* 558 (2). The question here was whether a certain proposed road was a "street" within the meaning of the City of Bombay Municipal Act. The decision in that case turned chiefly upon the meaning of the word "street" and the definitions given by certain eminent jurists were referred to at pages 567 and 568, and it was held that the proposed road would constitute a street within the meaning of the Act.

I. L. R. 32 *Mad.* 527 (3). Here it was held that continued user by the public of a way raises a presumption that that way belongs to the public and that it has been dedicated by the owner for the public use.

Volume VIII, Indian Cases p. 175 (4).—Here again it was held that dedication must be presumed from the user by the public of a thoroughfare as a high-way. Where there has been

(1) (1880) 6 *Cal. L. R.* 282 (*Anderson v. Juggodumba Dabi*).

(2) (1906) *I. L. R.* 20 *Bom.* 558 (567, 568) (*Municipal Commissioner, Bombay, v. Mathurabai*).

(3) (1909) *I. L. R.* 32 *Mad.* 527 (*Mannada Mudali v. Nallaya Gounden*).

(4) (1910) 8 *Indian Cases* 175 (*Vibudapriya v. Esoof Sahib*).

a general user by the public, a dedication without reservation would be presumed, if that was possible, and the burden of proving any reservation would be on the party contending for it. One of Mr. Shafi's arguments may conveniently be disposed of at this point. He urges that the only members of the public who were allowed to use the way were those who wanted to buy or sell grain in the market or had some other business there. According to the principle enunciated in 8 *Indian Cases*, 175 (1), the onus was on plaintiffs to show that the dedication was limited to a particular class of persons. We cannot find anything in the evidence to support the view that in the present case the dedication was a limited one and that there was any reservation by the predecessors of the Nawabs, and that only those persons who had business in the *mandi* were allowed into it.

I. L. R. 33 *Cal.* p. 1290, at page 1296 (2), where it is stated that an implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel; it proceeds not upon the principle that a grant has actually been made, but rather on the principle that the owner having allowed the public to enjoy the user for any particular purpose is estopped from denying the right of the public to the enjoyment of such user.

Mr. Shafi on behalf of the plaintiff-respondents, referred to *I. L. R.* 6 *Bom.* 686 (3); *I. L. R.* 20 *Bom.* 146 (4) and 25 *W. R.* 233 (5). In the 6 *Bombay* case it was held that such limited access by the public as was there proved was not sufficient to show that the court in question ceased to be private property, and was converted into a street vesting in the Municipality. That case was distinguished in 30 *Bombay*, page 558, at page 568, and it was pointed out that in the ruling in question no reference was made to the definition of street in the *Bombay District Municipal Act*. On the same page the High Court distinguished 20 *Bombay* 146. The facts in both those cases are distinguishable from those in the present one and we do not think that they help the respondents in any way.

In the 25 *Weekly Reporter Case* the facts also were quite different. There it was found on the evidence that the residents of two or three neighbouring villages used a certain road for the

(1) (1910) 8 *Indian Cases* 175 (*Vibudapriya v. Esoof Sahib*).

(2) (1906) *I. L. R.* 33 *Cal.* 1290 (1296) (*Chairman of Haurah Municipality v. Khetra Krishna*).

(3) (1882) *I. L. R.* 6 *Bom.* 686 (*Kalidas v. Municipality of Dhandhuka*).

(4) (1894) *I. L. R.* 20 *Bom.* 146 (*Ahmedabad Municipality v. Manilal*).

(4) (1876) 25 *W. R.* 233 (*Sham Soonder v. Monce Ram Doss*).

passage of themselves and cattle, but it was also found that the road was solely used by men of those particular villages, and that the residents of other villages had no right and as a matter of fact were not allowed to use it. It was therefore held that the road being used by only one section of the community was not a public one. We have no quarrel with the decision in that case, but it is obviously of no assistance to the plaintiffs in the present case.

Now having regard to the authorities, and viewing the matter from a common-sense point of view, there can in our opinion be no doubt that there has been an implied dedication to the public of a road-way in Nawab Ganj. We think this inference clearly follows from the fact that the Nawabs' predecessors built these shops and established a grain market with an open space lying between them, which open space or part of it was obviously meant to be used by carts bringing in grain and by members of the general public who came to buy and sell, and which moreover opens into public thoroughfares at several points and which has all along been used in the manner stated without any interruption. Several of the exits from the market were no doubt provided with gates which used to be shut at night for protective purposes only, but this in our opinion makes no difference, and does not show that the plaintiffs' predecessors reserved to themselves the right of closing the market at their pleasure. The road now made by the Municipal Committee is ten feet wide and it is not urged that this is an unreasonable width.

We hold then that there has been a dedication of this road to the public and we accept the appeal and setting aside the order of the Lower Appellate Court dismiss plaintiffs' claim with costs in both Courts.

Appeal accepted.

No. 109.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Scott-Smith.*

MUNICIPAL COMMITTEE, KARNAL—(DEFENDANT)—
APPELLANT,

Versus

NAWABZADA MUHAMMAD UMAR DARAZ ALI
KHAN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 2731 of 1914.

*Punjab Municipal Act, III of 1911, section 3 (13) (b) —limited access of
public to a private place—presumption of dedication of road to public.*

Held, that in the case of a private *serai* (in which there are no shops) occupied by tenants of the proprietors there was no presumption of dedication of a high-way to the public, a limited access by the public to a private place not operating to convert it into a public street, and consequently the Municipal Committee had no right to interfere with gates put by the proprietors.

I. L. R. 6 Bom. 686 (1) and I. L. R. 20 Bom. 146 (2), referred to.

First appeal from the decree of Sardar Ali Hussain Khan, Kazalbash, District Judge, Karnal, dated the 23rd December 1912.

C. Bevan Petman, for Appellant.

Muhammad Shafi, for Respondent.

The judgment of the Court was delivered by—

12th April 1916.

SCOTT-SMITH, J.—The case out of which the present appeal arises is intimately connected with that to which Civil Appeal No. 461 of 1913* relates. Both the cases were decided in the lower Court by the same judgment, and the appeals have been argued consecutively before us by same counsel.

The present case concerns 2 gates of the Korianwala *serai* in a suburb of the town of Karnal. The plaintiff owns one-third of the *serai* and 2 other proprietors own the other two-thirds. On the north of the *serai* there is a large gateway leading into the Nawab Ganj; it is gateway No. 5 in the other case, and we have held in our judgment that there is a public street in the Ganj up to the gateway.

The other gate is a small one on the east of the *serai* and leads into a passage communicating with another part of the Nawab Ganj. There were, it is admitted, formerly gates at the northern gateway, but these had fallen down some years before the present dispute arose in 1912. The Committee sent the plaintiff a notice saying that the gate had fallen and that the public had made a latrine behind them, and asked him to remove them. Upon this the plaintiff proceeded to put up the gates in position and also to repair the gates on the east of the *serai*. The Committee then served plaintiff with a notice to remove the gates upon which he brought the present suit for a declaration and an injunction.

The lower Court holding that the *serai* is a private one and that the Municipal Committee has no right to interfere decreed the claim. The Committee appeals.

It is clear from the evidence that the gates in question used to be regularly shut at night, but that for a period

(1) (1882) *I. L. R. 6 Bom. 686* (*Kalidas v. Municipality of Dhandhuka*).

(2) (1894) *I. L. R. 20 Bom. 146* (*Ahmadabad Municipality v. Manilal*).

* Printed as No. 108 on page 328 *supra*.

variously estimated at 5, 10 or 15 years prior to suit those of the northern gateway had been lying on the ground.

It is further clear that the Serai Korianwala is a private *serai* occupied by tenants of the proprietors, who have a right of way over the road leading through the Nawab Ganj by way of the Golakh Gate. No one can interfere with this right of way and if the northern gate in dispute were to be closed so as to interfere with their right, they would have a cause of action; but we do not understand how the Municipal Committee can have a right to interfere with the gates. There are no shops in this *serai* and there is no presumption of dedication of a high-way to the public in general such as arises in the other case. The rulings cited by Mr. Shafi in the other case, *viz.*, *I. L. R. 6 Bom. p. 686* (1), and *20 Bom. p. 146* (2), apply here and are authority for the proposition that a limited access by the public to a private place does not operate to convert it into a public street.

We therefore agree with the decision of the lower Court in this case and dismiss the appeal with costs.

Appeal dismissed.

No. 110.

Before Hon. Mr. Justice Rattigan.

NAWAB—(INSOLVENT)—APPELLANT,

Versus

TOPAN RAM AND OTHERS—RESPONDENTS.

Civil Appeal No. 537 of 1916.

Provincial Insolvency Act, III of 1907, section 43—proper procedure before a sentence can be passed.

Held, that before a debtor can be sentenced to the penalty laid down in section 43 of the Provincial Insolvency Act, the ordinary procedure necessary for criminal proceedings must be gone through and a substantial defect in that procedure would be a ground for reversing the order.

27 *Indian Cases* 199 (3), *I. L. R. 17 Cal. 209* (4), *I. L. R. 27 Bom. 394* (5) and 30 *Indian Cases* 839 (6), referred to.

(1) (1892) *I. L. R. 6 Bom. 686* (*Kalidas v Municipality of Dhandhuka*).

(2) (1894) *I. L. R. 20 Bom. 146* (*Ahmedabad Municipality v. Manilal*).

(3) (1912) 27 *Indian Cases* 199 (*Harihar Singh v. Moheswar Proshad*).

(4) (1889) *I. L. R. 17 Cal. 209* (*Rash Behari Roy v. Bhugwan Chunder*).

(5) (1903) *I. L. R. 27 Bom. 394* (*In re Vallabhdas Jairam*).

(6) (1915) 30 *Indian Cases* 839 (*Ramasamy Chetti v. Bank of Madras*).

Miscellaneous first appeal from the order of F. W. Kennaway, Esquire, District Judge, Mianwali, dated the 16th February 1916.

Nand Lal, for Appellant.

B. N. Kapur, for Respondents.

The judgment of the learned Judge was as follows :—

14th April 1916.

RATTIGAN, J.—The petitioner was adjudicated an insolvent by order of the Court dated 1st May 1915 and the Civil Nazir was appointed receiver of the insolvent's property.

On the 21st December 1915 the receiver presented a written application to the Court to the effect that the insolvent had made certain alienations of his property which were liable to be annulled by the Court under sections 36 and 37 read with section 16 (b) of Act III of 1907, and had obstructed the receiver in the discharge of his duties by threatening to assault any one who attempted to sell his property. The application set forth that this latter conduct on the insolvent's part did not appear to fall within the purview of Act III of 1907 and that the insolvent should therefore be bound down to keep the peace.

Upon this application the Court passed the following order :—"The transfers are liable to be annulled under section 36 and section 16 (b) and the insolvent is liable to imprisonment under section 43. Let him and the transferees be called, also the receiver."

The hearing was fixed for the 16th February 1916 and on that date the Court after taking the statements on solemn affirmation of the receiver and the insolvent, passed an order annulling two of the transfers and finding the insolvent guilty of obstructing the receiver and of making a false entry in the list of assets by not disclosing the fact that 77 kanals 4 marlas of land owned by him were under mortgage. It was accordingly ordered under section 43 of the Act that the insolvent should suffer simple imprisonment for three months.

The insolvent has appealed from the latter part of the order and it has been urged on his behalf that the proceedings of the Court were contrary to law, inasmuch as no definite charge, stating the specific offences of which the insolvent was alleged to be guilty, had been framed and the Court's proceedings were hasty and irregular.

In my opinion this objection must prevail. It has frequently been laid down that proceedings under section 43 of the Act are in the nature of criminal proceedings, and that it is necessary that there should be a charge, a finding and a

conviction as a foundation for the sentence. Everything should be strictly and accurately pursued and if in any one of these particulars a substantial defect should appear, it would be a ground for reversing the proceedings (see 27 *Indian Cases* 199 (1); *I. L. R.* 17 *Cal.* 20 (2); 27 *Bom.* 394 (3); 30 *Indian Cases* 839; (4).

In the present case there was no charge of any specific offence punishable under section 43 of the Act. The receiver deposed that the insolvent threatened to assault any one who attempted to sell the *kothas*, cattle, etc., and then the insolvent, who was examined as a witness on solemn affirmation, denied that he had offered any such threat. It is true that he was also asked why he had not mentioned the fact of the mortgage in his list of assets and that he made the absurd reply that he had quite forgotten the existence of the mortgage. But it is clear from the proceedings that he had no idea that this latter fact was charged against him as an offence for which he was liable to imprisonment under section 43, and indeed there is nothing to show that he was led to understand that any particular act or omission on his part was to form a charge against him. In the circumstances I must hold that the proceedings were wholly irregular and must be set aside.

I direct accordingly, but this order will not prevent the Court from taking fresh proceedings in accordance with law against the insolvent as regards the acts or omissions which, it is alleged, have rendered him liable to punishment under section 43 of the Act.

I need hardly add that my order will not affect that part of the Court's order which annulled the two transfers.

Appeal accepted.

No. 111.

Before Hon. Mr. Justice Shah Din.

MIHAN SINGH AND OTHERS—(DEFENDANTS)—
PETITIONERS,

Versus

MUSSAMMAT BHAGWAN KAUR- RESPONDENT.

Civil Revision No. 740 of 1915

Punjab Tenancy Act, XVI of 1887, section 77 (3), as amended by Punjab Act, III of 1912—proper procedure of Civil Court where in a suit

- (1) (1912) 27 *Indian Cases* 199 (*Harihar Singh v. Moheshwar Proshad*).
- (2) (1889) *I. L. R.* 17 *Cal.* 209 (*Rash Behari Roy v. Bhugwan Chunder*).
- (3) (1903) *I. L. R.* 27 *Bom.* 394 (*In re Vallabhdas Jairam*).
- (4) (1915) 30 *Indian Cases* 839 (*Ramasamy Chetti v. Bank of Madras*).

cognisable by it, it becomes necessary to decide a matter triable only by a Revenue Court.

Held, that 24 P. R. 1907 (1) and 76 P. R. 1909 (F. B.) (2) have been rendered obsolete by the *proviso* to sub-section (3) of section 77 of the Punjab Tenancy Act (added by Punjab Act III of 1912) and that the question whether defendants are occupancy tenants of the land concerned, arising in the suit, should have been referred for decision to a Revenue Court in the manner laid down in the said *proviso*.

Revision from the order of Lala Mul Chand, Senior Subordinate Judge, Ferozepore, dated the 25th May 1915.

Daulat Ram, for Petitioners.

Shaikat Rai, for Respondent.

The judgment of the learned Judge was as follows : —

2nd Feb. 1916.

SHAH DIN, J.—The Senior Subordinate Judge is right in holding that the suit as laid was one cognizable by a Civil Court; but he has ignored the proviso to sub section (3) of section 77 of the Punjab Tenancy Act which was added by Punjab Act III of 1912. That proviso runs as follows :—

“ 1. Where in a suit cognizable by and instituted in a Civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a Revenue Court the Civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by order VII, rule 10, Civil Procedure Code, and return the plaint for presentation to the Collector.”

“ 2..... ”

In the present case the principal plea urged by the defendants was that they were occupancy tenants of the land on which the trees in dispute stood, and that as such they had a right to cut those trees. The question whether the defendants were occupancy tenants or not of the land on which the trees stood is a matter which can, under sub-section (3) of section 77 of the Punjab Tenancy Act be heard and determined only by a Revenue Court; therefore the proviso to sub-section (3) applies to this case, and the Munsif who heard the suit should have proceeded in accordance with the directions contained in the first paragraph of the said proviso. 24 P. R. 1907 (1) which has been followed by the Senior Subordinate Judge and the Full Bench decision of this Court, 76 P. R. 1909 (2), have been rendered obsolete by the enactment of the proviso to sub-section (3) of section 77 to which reference has been made above.

(1) 24 P. R. 1907 (*Fakiria v. Dhani Nath*).

(2) 76 P. R. 1909 (F. B.) (*Haji Muhammad Bakhsh v. Bhagwan Das*).

I accept this revision and setting aside the order of the Senior Subordinate Judge send the case back to the Munsif with a direction that the provisions of the first clause of the proviso aforesaid be complied with. The parties will pay their own costs in this Court.

Revision accepted.

No. 112.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

GURANDITTA MAL DEVIDITTA MAL—(PLAINTIFFS)—
APPELLANTS,

Versus

RAM DAS AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 3056 of 1915.

Second appeal—perverse findings of fact—place of residence—ancestral home, visited occasionally, but actual residence elsewhere—Civil Procedure Code, Act V of 1908, section 20.

Held, that the Chief Court will not in second appeal interfere with the findings of fact of the Lower Appellate Court if these findings are not perverse, i.e. are based upon a consideration of all the material evidence.

Held also, that where defendants had lived and carried on business in Peshawar for forty years and there was apparently no intention of their ever returning to their original home at Nurpur, their place of residence under section 20 of the Code of Civil Procedure is Peshawar and not Nurpur, although they had an ancestral abode and some ancestral land at the latter place.

2 Bom. L. R. 605 (1) and rulings cited in Woodroffe and Amir Ali's Code of Civil Procedure, 1908 edition, at p. 169, referred to.

I. L. R. 1 All. 51 (2), I. L. R. 3 All. 91 (P. C.) (3), I. L. R. 14 Bom. 541 (552) (4) and I. L. R. 18 Bom. 290 (293) (5), distinguished.

Second appeal from the decree of N. H. Prenter, Esquire, District Judge, Jhelum, dated the 25th June 1915.

Beechey, for Appellants.

M. N. Mukerji, for Respondents.

The judgment of the learned Chief Judge was as follows:—

SIR DONALD JOHNSTONE, C. J.—In hearing a second appeal 22nd Feb. 1916.
the first thing this Court has to do is to see what are the findings of fact of the Lower Appellate Court, and if these

(1) (1900) 2 Bom. L. R. 605 (*Ugar Chand v. Surajmal*).

(2) (1875) *I. L. R. 1 All. 51* (*Fatima Begam v. Sakina Begam*).

(3) (1880) *I. L. R. 3 All. 91 (P. C.)* *Orde v. Skinner*

(4) (1890) *I. L. R. 14 Bom. 541 (552)* (*Goswami Shri v. Shri Govardhan Lalji*).

(5) (1891) *I. L. R. 18 Bom. 290 (293)* (*Goswami Shri v. Shri Govardhan Lalji*).

findings of fact are not perverse, *i.e.* are based upon a consideration of all the material evidence, to accept these findings and then to apply the law to them. In the present case I have heard the evidence on the record, and in my opinion not only has Mr. Prenter decided the facts on the evidence, but his view of the facts seems to me to be eminently reasonable and sound. He finds that, though the defendants have undoubtedly an ancestral abode and some ancestral property at Nurpur within the Jhelum District yet they have for forty years lived and carried on business in Peshawar; that everything goes to show that they have no intention of ever returning to live at Nurpur; that their house in Nurpur always remains locked, not being let out on rent and that defendant Ram Das has more than once tried to sell it; that defendants have no real interest in the family land in Nurpur; that the defendants, who were originally petty goldsmiths in their own village have now become substantial traders at Peshawar; and that their visits to Nurpur are few and far between.

The question is whether on facts such as these it may be said, with advertence to section 20, Civil Procedure Code, clause (a), that the defendants, at the time of the commencement of the suit, actually and voluntarily resided and carried on business or personally worked for gain at Nurpur.

For the appellant, Mr. Beechey contends that a man can have two or more places of residence and in support of his contention has quoted the well-known case *Orde versus Skinner* [*I. L. R. 3 All 91 (P. O.)*] (1). No one denies that a man can have more than one residence. Explanation 1 of section 20 of the Civil Procedure Code recognises this fact. The question is whether Nurpur can be said to be, in a reasonable sense, one of the defendant's places of residence. It seems to me that the ruling to be found in II Bombay Law Reporter 605 of 1900 (2), pronounced long after the Privy Council case makes the matter quite clear, for there it was distinctly held that a person, whose family home was at Ahmadabad, which home he occasionally visited, and who had lived and carried on business in Bombay for twenty years, could not be said to be residing at Ahmadabad at all; and there are a number of other rulings on the same lines quoted at page 169 of Woodroffe and Amir Ali's Code of Civil Procedure, edition 1908. Mr. Beechey tries to argue that this ruling in some way conflicts with the aforesaid Privy Council ruling, but I

(1) (1880) *I. L. R. 3 All. 91 (P. C.) (Orde v. Skinner)*.

(2) (1900) 2 *Bom. L. R.* 605 [*Ugar Chand v. Surajmal*].

am unable to see any conflict whatever, and the matter is carried no further by the other rulings quoted by Mr. Beechey, namely, *I. L. R.* 1 *All.* 51 (1); *I. L. R.* 14 *Bom.* 541 at page 552 (2), and *I. L. R.* 18 *Bom.* 290 at page 293 (3).

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

No. 113.

Before Hon. Mr. Justice Chevis.

**KAHLA SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS,**

Versus

DIALA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 2348 of 1915.

Indian Limitation Act, IX of 1908, article 144—possession of trespassers whether adverse ab initio to all descendants of common ancestor of last owner and plaintiff.

In 1875 one B. got the land of his wife's former husband D. mutated in his name, he having no right to it whatever. D. S., the nearest collateral of D., died on 10th December 1903 and his sons brought the present suit on 4th July 1914 to recover the land, *i.e.* within 12 years of their father's death.

Held, following 106 *P. R.* 1906 (4) that the possession of B, not being a person who obtained possession by virtue of an alienation but a mere trespasser, had been adverse *ab initio* to all descendants of the common ancestor of D. and the plaintiffs, and that the suit was consequently barred by limitation under article 144 of the Indian Limitation Act.

18 *P. R.* 1895 (*F. B.*) (5) and 26 *P. R.* 1911 (*F. B.*) (6) distinguished.

Second appeal from the decree of Major B. O. Roe, District Judge, Ambala, dated the 9th July 1915.

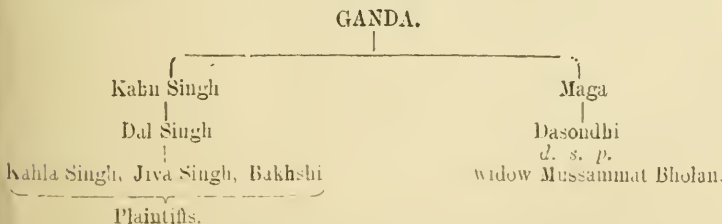
Pir Taj-ud-Din, for Appellants.

Nihal Chand Mehra, for Respondents.

The judgment of the learned Judge was as follows :—

CHEVIS, J.—The genealogical tree is as follows :—

23rd Feb. 1916.



(1) (1875) *I. L. R.* 1 *All.* 51 (*Fatima Begam v. Sakina Begam*).

(2) (1890) *I. L. R.* 14 *Bom.* 541 (552) (*Goswami Shri v. Shri Govardhan Lalji*).

(3) (1890) *I. L. R.* 18 *Bom.* 290 (293) (*Goswami Shri v. Shri Govardhan Lalji*).

(4) 106 *P. R.* 1906 (*Kaka v. Labh Chand*).

(5) 18 *P. R.* 1895 (*F. B.*) (*Roda v. Harnam*).

(6) 26 *P. R.* 1911 (*F. B.*) (*Sundar v. Subh Kam*).

The land in dispute belonged to Dasoudhi who died long ago. His widow Mussammat Bholan married Budhu, and defendants are her sons by Budhu.

As far back as 1875 Budhu got the land mutated in his favour, Mussammat Bholan appearing before the Revenue Officer, and affirming the marriage. Dal Singh died on 10th December 1903. His sons brought this suit to recover the land on 4th July 1914. The Lower Appellate Court has dismissed the suit as time-barred, holding that 26 P. R. 1911 (1) is not applicable as this is not a suit to recover land from an alienee, but from a trespasser.

There is no proof whatever that Mussammat Bholan transferred the land prior to her re-marriage, and certainly she could not do so after the marriage, as by that marriage she lost all rights in the land. So Budhu and his sons must rank as trespassers ever since 1875, and the only question argued before me is the question whether defendants' possession should be regarded as adverse to the plaintiffs in the lifetime of their father. I note that nothing has been said as to ground 2 of the appeal. As to ground 1 (c) it is admitted that article 144 does apply; the only question is, from what date defendants' possession should be considered as adverse to the plaintiffs. For the plaintiffs it is urged that possession only counts as adverse to them from the date of their father's death, and for this proposition strong reliance is placed on the Full Bench ruling 26 P. R. 1911 (1).

The learned District Judge distinguishes this ruling on the ground that the defendants in the present case are mere trespassers and not alienees, 106 P. R. 1906 (2) is certainly a direct ruling in defendants' favour. But it is only a Division Bench ruling, and is dissented from in 26 P. R. 1911 F. B. (see page 70) (1). But 26 P. R. 1911, after all, relies mainly on a previous Full Bench decision, 18 P. R. 1895 (3), which also is a case of a suit to recover land alienated, and which holds that a plaintiff does not derive his right to sue from or through the last male owner "inasmuch as his right to sue for possession, in spite of the last owner's act of alienation, is derived from no individual but from the customary rule which places a restriction upon the owner's powers of disposition of ancestral property and renders him liable to be controlled in that respect by his collateral heirs." This seems to me the basis of the whole decision, and

(1) 26 P. R. 1911 (F. B.) (*Sundar v. Salig Ram*).

(2) 106 P. R. 1906 (*Kaka v. Labh Chand*).

(3) 18 P. R. 1895 (F. B.) (*Roda v. Harnam*).

the above reasoning certainly cannot be held to apply to a case in which there has been no alienation at all.

I am therefore of opinion that so far as cases of suits to recover possession from trespassers, not persons who have obtained possession by virtue of an alienation, are concerned, 106 P. R. 1906 is still good law and that defendants' possession has been *ab initio* adverse to all descendants of the common ancestor of Dasondhi and the plaintiffs. I may add that before writing this judgment I have had the advantage of consulting my learned brother Rattigan, who wrote the judgment in 26 P. R. 1911.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 114.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Shadi Lal.*

UDHO RAM—(PLAINTIFF)—APPELLANT,

Versus

MEHR CHAND AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 108 of 1914.

Will—of a Hindu—construction of—absolute gift with gift over in case of death of legatee.

Plaintiff, as the son of one T. R. deceased, claimed the half share in certain houses left to his father under the will of his father's father. The will left a share to T. R. as *malik* and *kabiz* but went on to say, "in case he dies on account of the said disease (he was subject to fits of epilepsy) his wife shall be entitled to maintenance allowance and all the brothers shall be owners of his property in equal shares, etc." The will was dated 19th December 1894. The testator died in 1895 or 1896 and some two and a half years later T. R. begot a son, the present plaintiff, and died 10 months later.

Held, that having regard to the circumstances of the case and the provisions of the will as a whole the proper construction of the clause (above cited) was "in case he dies without issue *before me*, etc." and that consequently plaintiff was entitled to succeed to his father's share under the will.

I. L. R. 24 Cal. 834 (P. C.) (1), *I. L. R.* 40 Cal. 274 (P. C.) (2), 22 Cal. J. 316 (3), 27 Indian Cases 239 (Cal.) (4) and Mayne's Hindu Law, 8th edition, page 589, referred to.

I. L. R. 20 Cal. 906 (5) and 13 Indian Cases 571 (6), distinguished.

- (1) (1897) *I. L. R.* 24 Cal. 834 (P. C.) (*Lalit Mohun Singh Roy v. Chukhun Lal Roy*).
- (2) (1912) *I. L. R.* 40 Cal. 274 (P. C.) (*Tripurari Pal v. Jagat Tarini Dasi*).
- (3) (1915) 22 Cal. J. 316 (*Sures Chandra v. Lalit Mohun Datta*).
- (4) (1914) 27 Indian Cases 239 (Cal.) (*Nistarini Debya v. Behari Lal*).
- (5) (1893) *I. L. R.* 20 Cal. 906 (*Chukhun Lal Roy v. Lalit Mohun Roy*).
- (6) (1912) 13 Indian Cases 571 (*Ram Chand v. Dewan Chand*).

First appeal from the decree of E. R. Anderson, Esquire, Additional District Judge, Lahore, dated the 23rd October 1913.

Tirath Ram, for Appellant.

Santanam, Salim Ahmad Din and Gobind Ram, for Respondents.

The judgment of the Court was delivered by—

15th April 1916.

SIR DONALD JOHNSTONE, C. J.—The general facts of the case have been stated by the learned Subordinate Judge in his judgment under appeal and need not be repeated here. The case has been decided against the plaintiff upon the first issue.

Is plaintiff, as the son of Tirath Ram, entitled to a half share in the houses Nos. 5 to 8 mentioned in the will under the terms of the will (*sic*) executed by Beli Ram on the 19th December 1894?

The finding is that Baga Ram and Tirath (whole brothers) were members of a joint Hindu family; that this has not been pleaded by plaintiff, who claims by inheritance his father's share in the property left by the grandfather Beli Ram, that the will left a share to Tirath Ram no doubt but went on to say that on the death of Tirath Ram that share should revert to *all* the brothers; and that therefore plaintiff, who relies on that will, can take nothing.

Plaintiff in appeal contests this construction of the will and asks for a decree; and after examining the will and giving due consideration to surrounding circumstances, we are constrained to hold that the lower Court has fallen into error.

The will is dated 19th December 1894. Testator then died,* and some two and a half years later Tirath Ram begot a son, the plaintiff, and died 10 months later. The share left by the will to Tirath Ram is now with the sons and widow of Baga Ram, Tirath Ram's whole brother, who is also dead. In our opinion the will does not disinherit Tirath Ram's son. It will be found at pages 4 to 7 of the paper book. It gives certain property (not in suit) to the half brothers of Baga Ram and Tirath Ram, and gives other property to Baga Ram and Tirath Ram in equal shares, saying they shall be *malik* and *kabiz* thereof. Then, after making certain minor provisions regarding the marriage expenses of the aforesaid half brothers and a daughter, it goes on thus:—

“ The sum of Rs. 100 in cash should be given to Tirath Ram at the time of the *Ritan* ceremony and the share of Tirath Ram (in the estate) shall be entrusted to Baga Ram as he Tirath Ram is subject to fits of epilepsy. In case he

* Apparently in 1895 or 1896.

“dies* on account of the said disease, his wife shall be entitled to maintenance allowance and all the brothers shall be owners of his property in equal shares. Baga Ram shall realise the rent, etc., of the houses ” and shall receive remuneration for his trouble.

* Jan par hadisa

We have no hesitation in accepting plaintiff's interpretation of the meaning of the above and of the real wishes of the testator, namely, that the words “in case he dies” is “in case he dies without issue before me.” If we take the words to be unqualified and to cover death at any time, if, in short, we take the words as meaning merely “after his death,” a number of anomalies arise which may be stated thus :—

- (a) Tirath Ram, surviving his father, would become on the latter's death at once half owner with Baga Ram in certain property. On Tirath Ram's subsequently dying, his widow would have the ordinary rights of a Hindu widow, that is to say, she would have a life-estate in Tirath Ram's property. Why should the testator go out of his way to deprive her of possible independence and of her ordinary legal rights by providing that she should have maintenance merely ?
- (b) Similarly, if Tirath Ram should survive his father and then die, according to Hindu law Baga Ram, his whole brother undivided, would succeed to his estate in preference to, and not along with, the half-brothers. Why should Beli Ram have ordained this injury to Baga Ram, whom he declares in the will to be the manager and *sarbara* of the family ?
- (c) No doubt Beli Ram knew Tirath Ram was suffering from epilepsy but this is not an incurable disease and further it does not preclude a man from marrying and having off-spring. This is common knowledge. Beli Ram must have known that Tirath Ram might have a son, and no reason has been shown why he should want to disinherit such a son.

It is clear that all these anomalies disappear if the provisions regarding the effect of Tirath Ram's death are taken as intended to come into force only if Tirath Ram should die before the testator and should leave no son. There is also much force in plaintiff's argument that the attitude of the half-brothers tells in his favour. They have not contested plaintiff's claim or even asked to be made parties, and in the joint mortgage-deed,

exhibit P. 10 (page 1) as well as in other documents not printed, they have shown that they have treated plaintiff as on the same footing with the other consins.

On the other side Mr. Salim lays stress on three features of the will, *viz.* that Baga Ram was to have charge of Tirath Ram's share showing, according to the learned counsel, that the latter was really given only maintenance and that on the death of Tirath Ram his so-called share was to go to all the brothers, showing that Beli Ram never contemplated Tirath Ram's becoming owner at all; that Tirath Ram's widow was to get maintenance as a charge on the property. There is a certain plausibility in the first and second of these points, but we think the views we have stated above do more satisfactorily dispose of the difficulties and ambiguities of the will.

Cases of this sort depend upon their own peculiar facts, but, as counsel on both sides have quoted authorities, we may notice them briefly. In *I. L. R. 24 Cal. 834 (P. C.)* (1) it was explained *inter alia* that in a Hindu will the words "shall be malik" import the bequest of an heritable and alienable estate, unless the context indicates a different intention, and that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention.

In *I. L. R. 40 Cal. 274 (P. C.)* (2) it was ruled that the words in a will "my present begotten son will be *shebait*" was an absolute gift to that son on attaining majority and was not cut down by what followed, which merely provided for the contingency of his dying as a minor.

22 Cal. L. J. 316 (3) is a case in which the meaning of *malik* as stated in *I. L. R. 24 Cal. 834* (1) is again affirmed, and the view of the law stated in *I. L. R. 40 Cal. 274* (2) is again adopted and as to construction of Hindu wills our attention is drawn to Mayne, 8th edition, page 589, the remarks in which seem to us sound and correct.

Lastly we have the valuable ruling of the Calcutta High Court in *27 I. C. 239* (4), where it was laid down that the ordinary rule of construction where the testator has given an absolute gift to a legatee and then has made a gift over *simpliciter* on a contingency of death is that he was referring

(1) (1897) *I. L. R. 24 Cal. 834 (P. C.)* (*Lalit Mohun Singh Roy v. Chukkun Lal Roy*).

(2) (1912) *I. L. R. 40 Cal. 274 (P. C.)* (*Tripurari Pal v. Jagat Tarini Dast*).

(3) (1915) *22 Cal. L. J. 316* (*Sures Chandra v. Lalit Mohun Datta*).

(4) (1914) *27 Indian Cases 239 (Cal.)* (*Nistarini Debbya v. Behari Lal*).

to death before the period of distribution, which, we take it, would ordinarily be upon decease of testator.

On the other side Mr. Salim refers us to *I. L. R. 20 Cal. 906* (1), in which it is shown that in certain circumstances the use of the word *malik* in a will may, by reason of the general tenor of the will, not mean absolute owner. No one denies this. Also to Punjab case in *13 I. C. 571* (2), in which the facts were peculiar and it was laid down that in interpreting a will the document must be considered as a whole.

For these reasons we find on the first issue in favour of the plaintiff appellant. We accept the appeal and remand the case to the Court below for retrial under order 41, rule 23, Civil Procedure Code. Stamp on appeal will be refunded. Other costs will be costs in the cause.

Appeal accepted.

No. 115.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Shadi Lal.*

HARI SINGH—(PLAINTIFF)—APPELLANT,

Versus

ALLAH BAKHSH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1396 of 1913.

Dismissal for default—restoration—whether case should proceed where it left off—waiver of objection—review—whether appeal lies from order accepting review—Civil Procedure Code, Act V of 1908, order 47, rules 4 (2) and 7 (1) (b)—Revision—order passed without jurisdiction.

Held, per Johnstone, C. J., that where a reference to arbitration has been made by the Court at request of parties and, before the award was put in, the suit was dismissed in default and on application the case had been restored and no objection was made in the first Court to the continuation of the arbitration proceedings, an objection that these proceedings came to an end on dismissal of the suit should not be entertained by the Appellate Court.

Held also, per Johnstone, C. J., that there is much to be said for the view that when a case is restored after dismissal by default it does not become *res integra* but is again before the Court in the condition in which it was at the time of dismissal.

Held per curiam, where the lower Appellate Court had first decided that the dismissal in default had not rendered the pending arbitration proceedings null and void and subsequently on review took the contrary view and was "of opinion that the application for review should be granted," that having regard to the wide discretion given by order 47, rule 4 (2) of the

(1) (1893) *I. L. R. 20 Cal. 906* (*Chukkun Lal Roy v. Lalit Mohun Roy*)

(2) (1912) *13 Indian Cases 571* (*Ram Chand v. Dewan Chand*).

Code of Civil Procedure it was impossible to hold that that Court acted in contravention of rule 4 and consequently no appeal was competent under rule 7 (1) (b).

11 P. R. 1913 (1) and 3 I. Ap. 221 : I. L. R. 2 Cal. 131 (P. C.) (2), referred to.

24 W. R. 186 (3) and 25 W. R. 324 (4), distinguished.

Held, however, that as the award of the arbitrator made subsequent to the restoration of the suit was a legal award on the principle set out in the submitting order, the lower Appellate Court exercised a jurisdiction not vested in it by law in setting it aside in its order on review and that the latter order was, consequently, open to revision by the Chief Court.

Second appeal from the decree of Izzat Nishan Nawab Malik Khuda Bakhsh Khan, District Judge, Gujrat, dated the 27th February 1913.

Brij Lal, for Appellant.

Badr-ud-Din, for Respondent.

The order submitting case to a Division Bench was passed by—

25th April 1914.

SIR DONALD JOHNSTONE, C. J.—In this case plaintiff sued defendant for Rs. 74-8-0 and the first Court gave him a decree for Rs. 64-8-0 based upon the award of an arbitrator. The peculiar feature of the case is that, after the reference to arbitration by the Court at request of parties but before the award was put in, the suit was dismissed for default. In the order dismissing the suit nothing is said about the arbitration, though no doubt the immediate and necessary result was that the arbitration determined. Then upon application the case was revived and restored to the file, and apparently without objection by either party, the arbitrator was directed to put in his award. He was not re-appointed, nor was any fresh reference based on a fresh application by the parties made, but he was treated as being still arbitrator. He made his award, and apparently before he actually presented it to the Court, defendant filed written objections to the filing of the award giving as his grounds various charges against the arbitrator's impartiality. No objection was taken that the dismissal of the suit for default had put an end to the arbitration and that therefore the arbitrator's powers had finally ceased to exist. Defendant, not having attempted to establish his objections by evidence, the Court, as already stated, passed a decree in accordance with the award. Defendant appealed to the District Court, which held that no appeal lay, and further ruled that "the appellant's objection that the order appointing

(1) 11 P. R. 1913 (*Yusaf v. Naza*).

(2) (1876) 3 I. Ap. 221 : I. L. R. 2 Cal. 131 (P. C.) (*Reasut Hossain v. Hadjee Abdollah*).

(3) (1875) 24 W. R. 186 (*Koleemooddeen Mundul v. Heerun Mundul*).

(4) (1876) 25 W. R. 324 (*Chunder Churn v. Loduram Das*).

"the arbitrator or referring the case to arbitration has become void by reason of consignment of the case to the record room for default, is absurd." It was said in addition that the previous proceedings do not become null and void on restoration of a case dismissed on default, but that on restoration the case proceeds from the stage it had reached on dismissal.

The appeal having been dismissed, defendant applied for review, contesting the above opinion; and the Court on the same materials, changed its mind and accepted the appeal, set aside the decree and remanded for re-trial under order 41, rule 23, Civil Procedure Code, holding that the dismissal for default destroyed the arbitration and the case stood to be reheard on the merits.

Against this order an appeal has been filed here under order 47, rule 7, Civil Procedure Code, and respondent opens the campaign by the objection that no appeal lies. He also contends that the order of the lower Court is sound on its merits. On the latter question I may say at once that I cannot agree with him. I think there is much to be said for the view that, when a case is restored after dismissal for default, it does not become *res integra* but is again before the Court in the condition it was in at the time of dismissal; and here the defendant by his conduct—by the nature of his objections to the arbitration and to the filing of award—must be taken to have waived the objection which he made afterwards on appeal and which he makes now. The other question, however, is much more difficult.

Order 47, rule 7, must be strictly construed. Appeal is only competent on the grounds mentioned in clauses (a), (b) and (c) in sub-rule (1). Clause (a), referring to rule 2, is concerned solely with the matter of the *person* to whom petition for review is made; and no question of right or wrong person arises here. Clause (c) is connected with limitation and has no application in the present case. Clause (b) with its reference to rule 4 is the only clause that can possibly apply and the problem is this. The lower Court was "of opinion that the application for review should be granted" and therefore granted it: is this final or can this Court go behind that formation of opinion and interfere, if it considers the opinion was wrong? The following rulings afford some assistance in solving this problem, *viz.* 25 W. R. 324 (1), 24 W. R. 186 (2) and 3 I. A. 221-I. L. R. 2 Cal. 131 (3). The

(1) (1876) 25 W. R. 324 (*Chunder Churn v. Loodunram Deb.*).

(2) (1875) 24 W. R. 186 (*Koleemooddeen Mundul v. Heerun Mundul*).

(3) (1876) 3 Indian Appeals 221: I. L. R. 2 Cal. 131 (P. C.) (*Reasut Hossain v. Hadjee Abdoollah*).

authorities are not always easy to reconcile. For instance, in 24 *W. R.* 186 (1) it was ruled that special appeal was competent where review had been granted on no legal grounds; but in the *I. L. R.* case quoted above the opinion expressed was that where the Court granting the review had "jurisdiction" to deal with the matter and to review, no appeal lay. I think an authoritative ruling is called for and I therefore refer this case to a Division Bench.

18th April 1916.

The judgment of the Division Bench was delivered by—
SIR DONALD JOHNSTONE, C. J.—The facts and history of this case are given in the order of the Judge in Chambers, dated 25th April 1914, referring the case to a Division Bench, and we need not repeat the whole story. The questions now for us are whether any appeal lies, and, if not, whether we have any revisional powers in the circumstances.

Turning to order 47, rule 7, Civil Procedure Code, we see that there are only three grounds on which an appeal lies against an order granting an application for review *cf.* sub-rule (1), (a), (b) and (c). Here we are obviously not concerned with (a) or (c), and we have only to decide whether the granting of the application was in contravention of rule 4.

Turning next to rule 4, sub-rule (2) says that where the Court is of opinion that the application for review should be granted, it shall grant the same. This wide discretion is fettered only by two provisos with which we are not concerned here, the first dealing with procedure and the second emphasizing the necessity for strict proof of a certain kind of allegation. In the present case the lower Court obviously was of the opinion that the application should be granted and so granted it perforce. We think it is impossible to hold that that Court acted in contravention of rule 4; and we are supported in this view, stated in a different way, by 11 *P. R.* 1913(2).

Mr. Brij Lal for appellant relies upon 24 *W. R.* 186 (1) and 25 *W. R.* 324 (3). In the first case it was held that when an application for review has been granted "on no legal grounds," appeal lies, and in the latter case a similar rule is laid down for cases in which the lower Court has granted such applications "without proper ground." Those cases, of course, are under an old Civil Procedure Code and they conflict in principle with 11 *P. R.* 1913 (2) quoted above, and in short, we decline to follow them.

(1) (1875) 24 *W. R.* 186 (*Koleemooddeen Mundul v. Heerun Mundul*)
(2); 11 *P. R.* 1913 (*Yusaf v. Naza*).

(3) (1876) 25 *W. R.* 324 (*Chunder Churn v. Loodunram Deb.*).

Mr. Brij Lal then draws our attention to ground 1 (b) of his memorandum of appeal and asks us to interfere on the revision side, on the ground that the lower Appellate Court acted *ultra vires* in hearing the appeal at all, inasmuch as the judgment and decree of the first Court were in accordance with the award.

In reply Mr. Kureshi contends that there was no legal award because there was no regular fresh nomination of the arbitrators after the case had been dismissed for default and then restored, and that therefore appeal lay; but we agree with the view explained in the referring order and hold that there was a legal award.

It is clear, therefore, that the lower Appellate Court exercised a jurisdiction not vested in it by law and we revise its proceedings, rule that its interference with the first Court's judgment and decree was *ultra vires*, and restore that judgment and decree.

As to costs, considering that Mr. Brij Lal's client has strenuously insisted that appeal to this Court did lie when it did not, we think the parties should at least bear their own costs.

Appeal accepted.

No. 116.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Shadi Lal.*

AKBAR HUSSAIN AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

ALI AHMAD—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 2293 of 1913.

Pre-emption—on sale of occupancy rights under section 6 or 8 of the Punjab Tenancy Act, 1887, to the landlord.

Held, that plaintiffs, as collaterals of the vendor, have no right of pre-emption against the landlord-vendees who have purchased occupancy rights from their tenant, the vendor, and that this is so even though the said rights come under section 6 and section 8 of the Punjab Tenancy Act, and not under section 5.

31 P. R. 1896 (F. B.) (1), 21 P. R. 1902 (F. B.) (2), 19 P. L. R. 1907 (3), and 73 P. R. 1911 (4), referred to.

36 P. R. 1912 (5), disapproved.

(1) 31 P. R. 1896 (F. B.) (*Didaru v. Banna*).

(2) 21 P. R. 1902 (F. B.) (*Nihal Singh v. Khazan Singh*).

(3) 19 P. L. R. 1907 (*Bhag v. Buta Singh*).

(4) 73 P. R. 1911 (*Buri v. Mula Singh*).

(5) 36 P. R. 1912 (*Amar Singh v. Husaina*).

Second appeal from the decrees of P. D. Agnew, Esquire, Divisional Judge of Gujranwala at Lahore, dated the 11th of October 1913.

Badr-ud-Din Kureshi and Nabi Bakhsh, for Appellants.

Mehr Chand, for Respondents.

The judgment of the Court was delivered by—

2nd May 1916.

SIR DONALD JOHNSTON, C. J.—This case came before me in Chambers and was referred by me to a Division Bench because I did not feel justified in dissenting from the single Judge ruling by Chevis, J., to be found at No. 36 *P. R.* 1912 (1) while at the same time I had doubts regarding the correctness of that ruling. We have now heard the case argued and have considered the law and the authorities, with the result that I am still of opinion that the plaintiffs as collaterals of the vendor have no right of pre-emption against the landlord-vendees, who have purchased occupancy rights from their tenant, the vendor; and that this is so, even though the said rights do not come under section 5 of the Tenancy Act. I take it that no one questions the above proposition as regards rights under section 5, but Mr. Mehar Chand argues that the law is different when we come to rights under section 6 and section 8. I will first state the grounds for my opinion and then examine the difficulties raised by Mr. Mehar Chand.

A tenant holding under section 5 of the Tenancy Act has rights which he can transfer subject to a sort of pre-emptive right of his landlord—section 53. If the landlord notifies, within the time allowed, his intention to purchase, and pays the price fixed by the Revenue Officer, the occupancy rights are extinguished. If he does not, the tenant may sell to a third party without let or hindrance on the part of the landlord. Then, a right of occupancy under section 5 may be sold in execution of a decree or order of a Court, but again the landlord can intervene and take the bargain—section 55. In both these respects rights under section 5 differ from rights under sections 6 and 8, for section 56 lays it down that the latter kind of rights may not be sold under decrees or orders of Courts, and that they may not be transferred *at all* by private contract without the *previous consent in writing* of the landlord; and section 60 points the moral by expressly stating that transfers contrary to the preceding sections shall be voidable at the instance of the landlord, a consequence that would naturally have followed section 56, even if section 60 had been omitted.

Put in other words, the result of section 56 with section 60 is that a landlord can, if he chooses, absolutely prevent a tenant under any section but section 5 from transferring at all. If he covets the land, he can say to the tenant sell to me or not at all. In most cases the tenant wishes to sell because he is in urgent need of money or for some reason finds the land a burden, or wants money for some business or pleasure, and obviously his landlord wanting the land, has the tenant in the hollow of his hand. The latter must sell to the landlord, or else "relinquish" or "abandon" under Chapter IV. Can it be supposed that the law contemplates the tenant's collaterals coming in and claiming pre-emption—that is, claiming a right superior to the all-powerful landlord? If the tenant had proposed to sell or gift to those collaterals, the landlord would have checkmated them with the help of sections 56 and 60. If the landlord had forced the hand of the tenant and the latter had been compelled to "relinquish" or "abandon," the collaterals would have been helpless. Can it be that, because the landlord treats the tenant decently and buys him out, the former does by that act open a door whereby the collaterals can force themselves upon him?

31 P. R. 1896 (F. B.), (1) the earliest ruling we need notice, laid it down that, where an occupancy tenant—no distinction being apparently made between a section 5 tenant or one under any other section—sells to his landlord, the tenant's collaterals cannot contest the alienation on the score of custom. This is not directly in point, of course, for the law of pre-emption is a distinct law from the judge-made law we call custom, but the views stated as to the intentions of the Legislature in framing Chapter V of the Tenancy Act are helpful, and I have been specially impressed by the following passages in the judgments recorded, namely, in *Roe, C. J.*'s judgment—"the reversioners.....cannot oppose it on the ground that it is opposed to custom"—and in *Rivaz, J.*'s judgment—"the primary object of the provisions under this head (Chapter V, Tenancy Act) is of course to settle the law as between landlord and tenant, but it seems to me perfectly clear that where there is an express and unqualified provision as to the acquisition of a right either by a landlord or a tenant, the enactment is equally binding upon third parties whoever they may be." The plaintiffs there, it will be seen, were defeated *not because they had failed to prove a custom or law calculated to help them but because the provisions of the*

Tenancy Act were held of their own force to exclude the application of any other law or custom favouring third parties.

The next case, 24 P. R. 1902 (F. B.) (1), is a purely section 5 case and is also concerned with contest by reversioners. 19 P. L. R. 1907 (2) lays it down that reversioners cannot contest a mortgage, though made without their consent, of occupancy rights to the landlord, to whom the tenant could even surrender the tenancy *in toto* and *gratis* without their consent; and 73 P. R. 1911 (3) is to much the same effect.

The S. B. case 36 P. R. 1912 (4) is the only one we have found dealing directly with pre-emption. I reproduce here my summary of that ruling as given in my referring order.

"36 P. R. 1912 was a case of occupancy rights under section 6 of the Act. It was held that section 53 had no bearing on the case, that the landlord is protected, if at all, by sections 56 and 60, under which he cannot pre-empt, but can only sue to avoid a private transfer of rights made without his consent in writing, that here he does not claim to avoid a sale, but to support a sale to himself as against a pre-emptor, that once the sale has taken place, he is, by reason of being a party to the sale, *i. e.*, by being himself the purchaser, estopped from impugning the sale and from availing himself of section 60 of the Act, and that thus the sale stands and is liable to pre-emptory claims under Act II of 1905."

It is convenient here to set forth Mr. Mehr Chand's argument. He contends that, while section 53 "authorises" alienation to landlords of rights under section 5, and so makes the landlord the first pre-emptor, section 56 merely gives the landlord the right to veto an alienation to a stranger, this veto to be exercised in the Revenue Courts—see section 77 (3) (h), Tenancy Act—with the result that the bargain would not come to the landlord but matters would revert to the *status quo-ante*; further, that the enactment of section 2 (2) of the Pre-emption Act, saving sections 53 and 54 of the Tenancy Act, and not mentioning sections 56 and 60, shews the Legislature intended freely to allow pre-emption in cases of sales of occupancy rights, not being under section 5, even against landlords. That sub-section runs thus:—

(1) 24 P. R. 1902 (F. B.) (*Nihal Singh v. Khazan Singh*).

(2) 19 P. L. R. 1907 (*Bhag v. Buta Singh*).

(3) 73 P. R. 1911 (*Buri v. Mula Singh*).

(4) 36 P. R. 1912 (*Amar Singh v. Husaina*).

“ Nothing in this Act shall affect the provisions of Order “ XXI, rule 88, of the Code of Civil Procedure, 1908, or sections “ 53 and 54 of the Punjab Tenancy Act, 1887. ”

There is undoubtedly a good deal of force in these contentions and in the reasoning of the Judge responsible for 36 *P. R.* 1912, (1) but I find myself unable to accede to those contentions or to assent to that reasoning. First, as regards section 2 (2), Pre-emption Act, no doubt in such cases some explanation must be arrived at of the inclusion of one thing and the exclusion of another. Mr. Mehr Chand argues that the explanation here is that the Legislature intended to save pre-emptory rights of landlords in cases of sales of rights under section 5 and did not intend to save any rights to them in cases under section 6 or section 8. But I would say that this goes too far. It seems to me, first, that the predominant pre-emptory right of the landlord was so conspicuous in section 53 and section 54 of the Tenancy Act that the question must have occurred to the framers of the Pre-emption Act whether they should bring the landlord into section 12 of the latter Act, and that, looking at the peculiar but most convenient procedure provided in section 53, well understood by the people and sanctioned by 30 or 40 years' use, they decided not to do so but simply to mention that the Pre-emption Act was not to affect that procedure and its legal results. In the case of section 56 and sales of rights under section 6 or section 8, there is no procedure laid down which would clash with that provided in the Pre-emption Act, and further it would very likely never occur to any one that a suit for pre-emption in the case of a practically non-transferable right could ever be brought. In my opinion, then, little importance can properly be attached to the wording of section 2 (2) of the Pre-emption Act.

As regards the other part of Mr. Mehr Chand's argument I begin by saying that it is an established and most useful canon of construction of statutes that an interpretation should be rejected which leads to palpable absurdity. I am well aware that it is no strong argument against an interpretation that it seems to lead to injustice or ordinary inconvenience, but in my opinion Mr. Mehr Chand's interpretation in this case leads to flagrant absurdity. In the first place, a right of occupancy under section 5 is a more valuable right than one under any other section, being a transferable right in the proper sense of the term, while a right under section 6 or section 8 can hardly be styled transferable; and yet I am asked to hold that, when a landlord, by purchasing from his tenant in the

(1) 36 *P. R.* 1912 (*Amar Singh v. Husaina*).

former case, wipes out that valuable right, which the seller's reversioners were expecting some day to inherit, the reversioners have no remedy either by contest under custom or by a suit for pre-emption, but, when a landlord, by purchase in the latter case, takes over something much less valuable, or, in other words, repairs by purchase a much less serious defect in his own *dominium*, the reversioners can pre-empt, though the landlord could have checkmated them by refusing to sanction any transfer whatever or to purchase himself.

But an even more obvious absurdity remains. Take it that a tenant under section 6 sells to his landlord, and that a claim by a reversioner to pre-empt is allowed and decreed. In my opinion the landlord, who has never given his consent in writing, could by recourse to a Revenue Court avoid the transfer to the reversioner; or he could even cancel the sale to himself immediately the claim to pre-empt was put forward—see Rivaz, J., in 31 *P. R.* 1896, (1) bottom of page 88. In 36 *P. R.* 1912 (2) it is said that the landlord would be estopped from acting under section 60, Tenancy Act, but the law of estoppel is a law that must be strictly construed against those invoking it. Can it be said that by his conduct the landlord led the reversioners pre-emptors to believe that he was willing they should purchase? On the contrary he showed unmistakably that he wanted the land for himself; and if there is no estoppel against the landlord, the net result is that the land goes back to the tenant, who presumably and *ex hypothesi* does not want it, and a deadlock ensues.

In short, I would hold it as a piece of inexpugnable logic that, if by law A has the power to prevent B from selling his land to any one but A, and can even refuse to purchase it himself when B wants to sell it, it follows that no outsider can claim to pre-empt over A, when he does buy, whatever may be the outsider's rights on an independent interpretation of the phraseology of the Pre-emption Act standing by itself.

I would, therefore, hold in the present case that the plaintiffs have no case and their suit should be dismissed, but, in view of 36 *P. R.* 1912 (2), I would let the parties bear their own costs.

SHADI LAL, J.—I concur in the conclusion reached by the learned Chief Judge. The appeal is accepted and the plaintiff's suit is dismissed.

Appeal accepted.

(1) 31 *P. R.* 1896 (*F. B.*) (p. 88) (*Didaru v. Banna*).
(2) 36 *P. R.* 1912 (*Amar Singh v. Husaina*).

No. 117.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon Mr. Justice Shadi Lal.

RAM JAWAYA MAL—(PLAINTIFF)—APPELLANT,

Versus

DEVI DITTA MAL AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No 622 of 1914.

Civil Procedure Code, Act V of 1908, section 104 (d) and (f)—Appeal from order setting aside award of arbitrators made on reference by Court—Decree—Revision—Court entertaining objections notwithstanding agreement of parties to accept award without objection—Court-fee on appeal—Court Fees Act, Schedule II, article 17 (vi)—mala fides of arbitrators—Ground for setting aside award—Jurisdiction of Civil Court to deal with that part of an award, which divides agricultural land—Punjab Land Revenue Act, XVII of 1887, section 158.

The parties to this case, being a father and his two sons, entered into an agreement to refer the division of their joint property to arbitrators—one of the clauses of the agreement was "the arbitrators are authorized to partition between us our entire property - and to allot unequal shares to us. But they are not authorized to exclude any party altogether. *
" * * * None of the parties shall be competent to object to or refuse to submit to the award of the arbitrators."

Application was made by one of the sons after some time under article 17, schedule II of the Code of Civil Procedure to file the agreement in Court and the parties again agreed to the submission to the arbitrators in terms of their agreement and that they shall abide by their decision, i.e. the award which the arbitrators may file.

Reference was, therefore, made and the arbitrators filed their award. Both sides filed their objections but only those of the defendants were serious. Dealing with them the Court found that the award gave practically no share to the father, defendant 1, which was against the terms of the agreement, and that the arbitrators were also guilty of certain misconduct and passed a decree dismissing both the applications for filing the agreement and of award. The plaintiff appealed to the Chief Court against the order of the lower Court under section 104 (d) and (f) of the Court of Civil Procedure.

Held that section 104, clauses (d) and (f) had no application, (d) as notwithstanding the peculiar wording of the decree the lower Court did not refuse to file the agreement to refer nor did it refuse to act upon it, and as regards (f), the award was not made without the intervention of the Court.

9 P. R. 1913 (1) and 28 P. R. 1914 (2), referred to.

Held also, that the rejection or acceptance of an award is not ordinarily open to revision, (a) as the order disposes of a question of law and

(1) 9 P. R. 1913 (*Jagrin Nath v. Nanak Chand*).

(2) 23 P. R. 1914 (*Wali Muhammad v. Bahawal Bakhsh*).

thus the order, even if wrong, cannot be called a material irregularity, and (b) appellant has another remedy by regular suit.

66 P. R. 1915 (1), 21 P. R. 1898 (F. B.) (p. 59) (2), 25 P. R. 1902 (P. C.) p. 101 (3), 89 P. R. 1902 (F. B.) (4), and I. L. R. 30 Cal. 397 (F. B.) (5), referred to.

Held further, that in the present case the lower Court did not act *ultra vires* in hearing objections notwithstanding that the parties undertook by their agreement to raise no objections to the award.

I. L. R. 6 Mad. 368 (6) and Indian Contract Act, section 28, referred to.

Correctness of *dictum* of Rattigan, J. in Civil Appeal 1997 of 1912, doubted.

Held however, that the order of the lower Court amounted in law to a "decree" and was as such appealable.

25 P. R. 1902 (P. C.) p. 99 (3), 81 P. R. 1901 (F. B.) (last part) (7), 126 P. R. 1907 (8), I. L. R. 27 Mad. 255 (9) referred to.

28 Indian Cases 61 (Sind) (10), disapproved.

I. L. R. 5 All. 333 (F. B.) (11), I. L. R. 6 All. 186 (F. B.) (12), I. L. R. 21 Bom. 63 (13), I. L. R. 25 Cal. 757 (F. B.) (14) and I. P. L. R. 1911 (15), distinguished.

Held further, that the appeal asking this Court to cancel the order setting aside the award and to remand the case to be dealt with according to law embodied a prayer that cannot be valued in money and falls under article 17 (vi) of schedule II of the Court Fees Act, and that the Rs. 10 Court-fee put in by appellant was consequently sufficient.

Held lastly, that a Civil Court has jurisdiction to deal with that part of an award which fixes the shares of the parties in agricultural land, as this is not an actual partition of the fields but merely a division of shares and only settles title.

Miscellaneous first appeal from the decree of Lala Dimodar Das,

District Judge, Multan, dated the 28th February 1914.

Broadway, Sheo Narain and Sewa Ram Singh, for Appellant.

C. Bevan-Petman and Moti Sagar, for Respondents.

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- (1) 66 P. R. 1915 (*Ahmad Din v. Atlas Trading Company*).
 - (2) 21 P. R. 1898 (F. B.) (p. 59) (*Narain Das v. Manohar Lal*).
 - (3) 25 P. R. 1902 (P. C.) (p. 101) (*Ghulam Jilani v. Muhammad Hassan*).
 - (4) 89 P. R. 1902 (F. B.) (*Panna Lal v. Mussamat Soman*).
 - (5) (1903) I. L. R. 3 Cal. 397 (F. B.) (*Kali Charn v. Sarat Chunder*).
 - (6) (1883) I. L. R. 6 Mad. 368 (*Ranga v. Sithaya*).
 - (7) 84 P. R. 1901 (F. B.) (last part) (*Jhanga Ram v. Mussamat Budho Bai*).
 - (8) 126 P. R. 1907 (*Narpat Rai v. Devi Das*).
 - (9) (1903) I. L. R. 27 Mad. 255 (F. B.) (*Ponnusami v. Mandi Sundara*).
 - (10) (1914) 28 Indian Cases 60 (*Sennal Nihalchand v. Mulomal Rahumal*).
 - (11) (1883) I. L. R. 5 All. 333 (F. B.) (*Daya Nand v. Bakhtawar Singh*).
 - (12) (1884) I. L. R. 6 All. 186 (F. B.) (*Bhola v. Gobind Dayal*).
 - (13) (1895) I. L. R. 21 Bom. 63 (*Mohan v. Tuka Ram*).
 - (14) (1898) I. L. R. 25 Cal. 757 (F. B.) (*Mahomed Wahid-ul-Din v. Hakimani*).
 - (15) 1 P. L. R. 1911 (*Narpat Rai v. Devi Das*).

The judgment of the Court was delivered by:—

SIR DONALD JOHNSTONE, C. J.—Of the parties to this case defendant 1 is the father, plaintiff the elder son, and defendant 2 the younger son. As early as 1910 they wished to separate, and on 6th March of that year they entered into an agreement to refer their differences to arbitration, nominating three gentlemen in whom they trusted, one of whom, Shanun Ram, was in the same sort made umpire, the important words in the reference being these:

3rd May 1916.

“The arbitrators are authorized to partition between us our entire property and to allot unequal shares to us. But they are not authorized to exclude any party “altogether.....None of the parties shall be competent to object to, or refuse to submit to, the award of the arbitrators.”

Some three years passed and no award was written, apparently owing to dissensions, and then on 5th February 1913 an application was made to Court, and a few days later an amended application, asking, with advertence to article 17, schedule II, Civil Procedure Code, that the agreement to refer be filed in Court and the usual proceedings be taken thereupon. Next on 28th March 1913 the parties put in a joint application saying a compromise had been effected, and that all parties now agreed to the appointment of arbitrators as in the agreement of 6th March 1910, and asking that the arbitrators be directed to file their award. The application goes on—

“We shall abide by their decision, *i. e.*, the award which the arbitrators may file”

Reference was then made and the arbitrators proceeded to work, and on 13th October 1913 put in their award, giving certain portions of the family property to each party. Both sides filed objections, but only those by defendants were serious. Dealing with them the learned District Judge held that there was a “fatal defect” in the award, inasmuch as it gave no “share” to defendant 1, but merely life-interest in a small piece of land, with a few insignificant odds and ends of other property, and so violated the injunction in the agreement of 6th March 1910 that no party was to be wholly excluded. He then went on to remark that the arbitrators imported their personal knowledge into the award as to certain moneys which they thought defendant 1 had concealed, without giving him an opportunity of testing their personal knowledge, and also found fault with them for not seeing the

property to be divided or ascertaining its value. On these findings the District Judge held that the award was invalid—apparently for misconduct of arbitrators—and dismissed with costs the application to file it. The decree dismisses both the application for filing of agreement and of award.

The first question for decision is whether appeal lies, and we have heard this discussed at great length. The appeal—see note at the end of the memorandum—is filed expressly as one against an order, *i.e.* under Civil Procedure Code, section 104, (d) and (f), which gives an appeal (d) against an order filing or refusing to file an agreement to refer to arbitration and (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court. We cannot see how either of these clauses can be invoked by the appellant-plaintiff, for, notwithstanding the peculiar wording of the decree, the District Judge did not refuse to file the agreement to refer nor did he refuse to act upon it, and, as regards (f), the award is not one made without the intervention of the Court. Clause (f) glances at article 20, schedule II, and not at article 17, under which the application of February 1913 was presented : *cf.* 9 *P. R.* 1913 (1) and 28 *P. R.* 1914 (2).

It is asked, then, by appellant that the petition be treated as a revision under section 70 of the Courts Act, but we cannot accede to this prayer. The matter need not be discussed at great length. The latest ruling of this Court is 66 *P. R.* 1915 (3), in which it was plainly held that rejection or acceptance of an award is not open to revision because (a) the order disposes of a question of law and that order, even if wrong, cannot be called a material irregularity, and (b) appellant had another remedy by regular suit. As to this second reason see also page 59 in 21 *P. R.* 1898 (*F. B.*) (4). Then from such rulings as 88 *P. R.* 1902 (*F. B.*) (5), and page 101 of 25 *P. R.* 1902 (*P. C.*) (6), we can deduce the principle that it is not sufficient for an applicant for revision to shew that the lower Court has erred, but that he must also shew that it acted without jurisdiction or refused to exercise its lawful jurisdiction :

(1) 9 *P. R.* 1913 (*Jagan Nath v. Nanak Chand*).

(2) 28 *P. R.* 1914 (*Wali Muhammad v. Bahawal Bakhsh*).

(3) 66 *P. R.* 1915 (*Ahmad Din v. Atlas Trading Company*).

(4) 21 *P. R.* 1898 (*F. B.*) (p. 59) (*Narain Das v. Manohar Lal*).

(5) 88 *P. R.* 1902 (*F. B.*) (*Hansraj v. Ganga Ram*).

(6) 25 *P. R.* 1902 (*P. C.*) (p. 101) (*Ghulam Jilani v. Muhammad Hassan*).

or proceeded illegally or with material irregularity. Again, in *I. L. R. 30 Cal. 397 (F. B.)* (1) it was laid down that a mistaken view as to what amounted to misconduct would not let in a revision though, of course,—*cf. 89 P. R. 1902 (F. B.)* (2) the *dictum* at page 101 of *25 P. R. 1902 (P. C.)* (3), already cited, must not be taken as laying down an unqualified rule that in arbitration cases, where there is no appeal, there can never be a revision. In the present case certain conduct of the arbitrators was objected to by defendants as misconduct, and the District Judge, after considering the matter, agreed that it was misconduct. If he had jurisdiction to consider the matter, he was right to exercise that jurisdiction; and we cannot find anything perverse in the District Judge's proceedings or in his expressions of opinion. No doubt plaintiff-appellant wishes us to hold that the District Judge acted *ultra vires* in hearing objections at all, inasmuch as, by the agreement of 6th March 1910, the parties undertook to raise no objections. In support of this contention we are referred to a *dictum* of Rattigan, J., in Civil Appeal 1997 of 1912, but we have grave doubts as to the correctness of that *dictum*, which is opposed moreover by *I. L. R. 6 Mad. 368* (4) and is also in conflict with at least the spirit of section 28, Contract Act. Further, we are bound to consider what the parties really meant by binding themselves not to make objections. We have little hesitation in holding that they meant little more than that they would accept the award, an engagement always made in these cases, and did not mean that fraud or bad faith on the part of the arbitrators could not be objected to. The wording of the application of 28th March 1913 reviving the arbitration supports this view, for in it we do not find any covenant in terms not to raise objections.

We find, however, that after all an appeal does lie because the order appealed against amounts in law to a "decree." It is a pity that plaintiff-appellant did not appeal as from a decree; but we do not think a mistake on the part of his legal advisers in this respect should put him out of Court, and we will now explain why we look upon the order as a decree.

Section 2 (2), Civil Procedure Code, lays it down *inter alia* that decree means the formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or

(1) (1903) *I. L. R. 30 Cal. 397 (F. B.)* (*Kali Charan v. Sarat Chunder*).

(2) *89 P. R. 1902 (F. B.)* (*Panna Lal v. Mussamat Soman*).

(3) *25 P. R. 1902 (P. C.)* p. 101 (*Ghulam Jilani v. Muhammad Hassan*).

(4) (1883) *I. L. R. 6 Mad. 368* (*Ranga v. Sithaya*).

any of the matters in controversy in the suit; and that it shall not include any adjudication from which an appeal lies as an appeal from an order. Now we have seen that no appeal lies from the present adjudication as an appeal from an order, and thus we have to decide merely—(i) what were the “matters in controversy” in the proceeding in the lower Court; (ii) were those matters or any of them “conclusively determined,” so far as regards the lower Court; (iii) was the proceeding a “suit”?

The award was presented by the arbitrators under order of the Court passed in accordance with the joint application of the parties dated 28th March 1913. Objections were put in, and the “matters in controversy” were in the main whether the arbitrators had been guilty of misconduct. The District Judge considered this, and, finding that the arbitrators had transgressed the terms of the reference by not giving defendant 1 a share but merely allotting to him a life interest in a small fraction of the property, and that they had acted wrongly in other ways as described earlier in this judgment, held that this was misconduct, and so set aside the award. No doubt the Court did not decide on the merits, as between the parties, their rights in the property under law or custom, but that was not the matter in controversy in this proceeding: the matter in controversy was whether the arbitrators had misconducted themselves. This the District Judge did decide and did conclusively determine, so far as he was concerned.

It remains to say whether the proceeding was a “suit.” This word is not defined in the Code, but it was, as required by article 17 (2), schedule II, registered and numbered as a suit, and it ended in a decree sheet being drawn up. Had the award not been set aside but accepted as a good award, a decree, albeit in accordance with the award, allotting such-and-such property to each party, would have ensued; and in these circumstances we see no difficulty in calling the proceeding a suit and the order a decree.

Turning to the authorities we find that in 25 *P. R.* 1902 (*P. C.*) (1) their Lordships said (page 99) “it would seem that the order made thereon is a decree,” the order in question being one of a kind similar to that we have under consideration here. This may be *obiter dictum*, but, as the expression of the views of the Privy Council, it must carry weight. Then, though a good deal of the ruling 84 *P. R.* 1901 (*F. B.*) (2)

(1) 25 *P. R.* 1902 (*P. C.*) (p. 99) (*Ghulam Jilani v. Muhammad Hassan*).

(2) 84 *P. R.* 1901 (*F. B.*) (last part) (*Jhangi Rom v. Mussammatt Budho Bai*).

was discredited in 25 *P. R.* 1902 (1) aforesaid, the last part of the ruling was not touched, and there it is distinctly said that orders rejecting applications under sections 523 and 525 of the then Code of Civil Procedure, which correspond to articles 17 and 20, respectively, of schedule II of the present Code, are decrees. Again, in 126 *P. R.* 1907 (2) a Division Bench of this Court held that an order under section 523, (old) Civil Procedure Code, admitting an application and ordering an award to be filed, when made, is a decree and so appealable. Lastly *I. L. R.* 27 *Mad.* 255 (3) is a clear authority so far as concerns applications under section 525 of the old Civil Procedure Code.

There is no doubt a conflict of authority on the subject, but we prefer to follow the above rulings. In 28 *I. C.* 60 (4) (Sind Judicial Commissioner's Court) it was held that such a proceeding as the one we are dealing with is not a "suit" and an order setting aside an award is not a "decree." We do not agree with the *ratio decidendi* set forth therein, *viz.*, that an application under article 17, schedule II, is merely a prayer to the Court to assist in the disposal of the dispute by a private tribunal, and is not a process for the recovery through the Court of a right or claim. Mr. Bevan-Petman's next authority *I. L. R.* 5 *All.* 333 (*F. B.*) (5) is not in point, being concerned with *refusal to file an agreement* under section 523, (old) Civil Procedure Code, nor is *I. L. R.* 6 *All.* 186 (*F. B.*) (6) directly in point, for there the case was one under section 525 (article 20), the award having been made before the application was put in. We observe, however, that indirectly these cases are in respondents' favour, but we are disposed to agree rather with the dissenting Judge than with his four learned colleagues. The next case quoted is *I. L. R.* 21 *Bom.* 63 (7) which loses some of its value by being concerned with the word "suit" in the Dekhan Agriculturists Relief Act. Then, though Macpherson, J., in *I. L. R.* 25 *Cal.* 757 (at page 767) (8) laid down the law in accordance with Mr. Bevan-Petman's views, the other Judges held very strong views of the opposite kind. 1 *P. L. R.* 1911 (9) (a judgment of a single

- (1) 25 *P. R.* 1902 (*P. C.*) (p. 99) (*Ghulam Jilani v. Muhammad Hassan*).
- (2) 126 *P. R.* 1907 (*Narpat Rai v. Devi Das*).
- (3) (1903) *I. L. R.* 27 *Mad.* 255 (*F. B.*) (*Ponnusami v. Mandi Sundara*).
- (4) (1914) 28 *Indian Cases* 60 (*Senmal Nihalchand v. Mulomal Rahumal*).
- (5) (1883) *I. L. R.* 5 *All.* 333 (*F. B.*) (*Daya Nand v. Bakhtawar Singh*).
- (6) (1884) *I. L. R.* 6 *All.* 186 (*F. B.*) (*Bhola v. Gobind Dayal*).
- (7) (1895) *I. L. R.* 21 *Bom.* 63 (*Mohan v. Tuka Ram*).
- (8) (1898) *I. L. R.* 25 *Cal.* 757 (*F. B.*) (*Mahomed Wahid-ud-din v. Hakiman*).
- (9) 1 *P. L. R.* 1911 (*Narpat Rai v. Devi Das*).

Judge) is not in point. There on an application to set aside an award the Court had passed an order rejecting the application and adjourning the case for consideration of its remaining aspects. That order was quite correctly said not to be a "decree," but obviously that case has no resemblance to the present one.

We find, then, that an appeal lies, and the next question for decision is whether the Rs. 10 Court-fee put in by appellant is sufficient or whether he should pay *ad valorem*. In our opinion the appeal falls under article 17 (*vi*) of schedule II of the Court Fees Act, for the application under article 17, schedule II, Civil Procedure Code, and the appeal here embody a prayer that cannot be valued in money. A large number of rulings have been cited on both sides, all of which we have examined, and the above is our conclusion. This case is a peculiar one and must be decided on its own facts. Plaintiff did not pray for a definite share or portion of any property. He asked the lower Court to file the agreement of 6th March 1910 and to direct the arbitrators named therein to proceed to enquire and decide. We fail to see how any money value can be assigned to such a prayer. Then in appeal, though no doubt things are rather more definite, for the award gives plaintiff certain land, moveables and houses, yet he does not ask this Court to give him a decree for them: he asks us to set aside the order setting aside the award and to remand the case to the lower Court to deal with it thereafter according to law—see articles 14 and 16, schedule 5, Civil Procedure Code. Here again our opinion is as above. We refrain from discussing the dozen or more authorities pressed upon our attention in which there is a good deal of conflict of opinion, but in which we think the weight of authority is on our side.

* * * * *

Mr. Moti Sagar, for respondents, contends that the Civil Courts have no jurisdiction to partition agricultural land, and therefore this claim should never have been entertained by the District Judge. The answer is easy. In the first place, the award does not divide up holdings by metes and bounds, but merely by shares, and really only settles "title," leaving, if the award had been enforced, the Revenue Courts to do the actual division.

* * * * *

We therefore dismiss this appeal with costs, save as regards a minor point taken in ground 3. No doubt Rs. 1,400 is the arithmetical maximum pleader's fee permissible, but we do not think the lower Court should have allowed so large a sum.

Taking all the circumstances into account we alter the figure 1,400 in the lower Court's decree into Rs. 250 and in this Court we allow Rs. 700, the fee received by Messrs. Petman and Moti Sagar, counsel for respondents.

Appeal dismissed.

No. 118.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Chevis.*

DAYA SINGH—(DEFENDANT)—APPELLANT,

Versus

BUTA SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 793 of 1913.

Civil Procedure Code, Act V of 1908, order 22, rules 4 (3) and 9 (2)—abatement—application to substitute names of heir of deceased party—limitation—sufficient cause for not presenting application in time—ignorance of death.

Held, that application for substitution of names of heirs of a deceased party must be made within 6 months of the death or the suit (or appeal) must abate—order 22, rule 4 (3) Civil Procedure Code—and the plaintiff or appellant is out of Court unless he can satisfy the Court that he was prevented by any sufficient cause from continuing the suit—order 22, rule 9 (2)—*i. e.*, the party must satisfy the Court that he had sufficient excuse for not applying in time."

Held also, that in the present case it had not been shewn that the appellant was not aware of the death of the respondent long before he made his application, and even if he was, his ignorance implied great negligence.

60 P. R. 1911 (1), referred to.

113 P. R. 1907 (2) and 43 P. R. 1889 note (3), distinguished.

*Second appeal from the decree of P. D. Agnew, Esquire,
Divisional Judge, Gujranwala Division, at Lahore, dated
the 11th January 1913.*

Devi Dayal and M. N. Mukerjee, for Appellant
Abdul Rashid, for Respondents.

The judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—This was a joint pre-emption suit by three plaintiffs, and in appeal No. 794 of 1913 we are concerned with another pre-emption suit between the same parties arrayed in the same manner. In one case decree passed in lower Appellate Court for possession on payment of Rs. 600 and in the other case on payment of Rs. 500. Vendee

4th May 1916.

(1) 60 P. R. 1911 (*Sayad Mir Nawab v. Hardeo*).

(2) 113 P. R. 1907 (*Dadu v. Kadu*).

(3) 43 P. R. 1889 note (*Ghulam Shah v. Malak Muzaffar Khan*).

has now appealed here, and he is met by the preliminary objection that both appeals have abated. We have heard the matter argued and our conclusion is that the objection is a valid one and must prevail.

The law is quite clear. Application for substitution of names of heirs of a deceased party must be made within 6 months of the death or the suit (or appeal) *must* abate—order 22, rule 4 (3), first Schedule, Civil Procedure Code; and the plaintiff or appellant is out of Court unless he can satisfy the Court that he was “prevented by any “sufficient cause from continuing the suit”—order 22, rule 9 (2)—which we take to mean that the party must satisfy the Court he had sufficient excuse for not applying in time.

It appears that Bhag Singh, plaintiff-respondent, died on 5th September 1914. This is not denied, nor is it denied that, the decree being a joint one, abatement as regards Bhag Singh implies total abatement. Application for substitution was made on 19th April 1915, or about one-and-a-half month's late. The reasons for delay are stated to be—

(a) Ignorance of *factum* of death until after the summonses in the present cases were returned with report of death.

(b) Absence of negligence on the part of the appellant.

Now Bhag Singh is a considerable land-owner, owning property both in *Mauza* Melu, where the land in suit lies and where the parties reside, though he also owns colony land in Chak No. 16, *Tahsil* Khangah Dogran, said to be 40 *kos* away. Melu is his home, and his son Sucha Singh lives there; and even if he actually died at Chak No. 16, as defendant appellant avers but respondents deny, it is not easy to believe that appellants, living at Melu, would not hear, at once or soon, of the death of an important land-owner, against whom he was engaged in litigation. That the death was probably commonly known in Melu is fairly clear from the fact that when the notices went to Melu for service the lambardar and Thakar Das, shopkeeper, reported that Bhag Singh had died more than 6 months earlier. It is also stated, and not categorically denied, that mutation of Bhag Singh's lands in Melu was made in favour of his sons before “Lohri,” *i.e.*, 13th January 1915, and, of course, mutation is a fairly public affair. We think, therefore, it may be safely concluded that appellants knew of the death of Bhag Singh long before he made his application, or at

least that, if he was not actually aware of it, his ignorance implies great negligence.

Mr. Mukerjee strives to show by reference to rulings that the facts of the present case argue "sufficient cause." He quotes 113 P. R. 1907 (1), but there many special circumstances existed to excuse ignorance of the *factum* of death, *e. g.*, there were no less than 18 defendants, one of whom had died, and they lived in a different village from the opposite party. In 43 P. R. 1889 (2) *note*, also there were numerous defendants and the opposite party was misled by the notice to dead man being returned as duly served. On the other side, 60 P. R. 1911 (3) is quite clear, ignorance of *factum* of death cannot by itself save a case.

We hold, therefore, that these appeals have abated and we dismiss them, with half costs.

Appeal dismissed.

No. 119.

*Refore Hon. Sir Donald Johnstone, Kt, Chief Judge,
and Hon. Mr. Justice Shadi Lal.*

JAMAIT ALI SHAH—(PLAINTIFF)—APPELLANT,

Versus

MIR MUHAMMAD AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1519 of 1914.

Muhammadian Law—marriage—Sayad woman with a man of another tribe—whether intalid—among Sunnis or Shias—ante-nuptial stipulation and breach of.

Held, that although equality in *nasab* (family or descent) is one of the 6 requisites laid down by the jurists of the *Hanafi* school of Muhammadian law it is a moot point of the *Sunni* law whether a marriage otherwise lawfully contracted by an adult woman can be or must be set aside by a Civil Court in British India at the instance of the so-called guardians (that is of the relatives who would be guardians if the woman had been a minor) if they can prove such social inequality on the part of the bridegroom, as would injuriously affect the family credit or interest.

But that the doctrine of the *Shia* law is clear that social inferiority on the part of the husband affords no ground for the cancellation of the marriage. Radd-ul-Muhtar, Vol. II, p. 529, referred to.

Held also, that in the absence of fraud a girl not *sui juris*, given in marriage by her father, cannot avoid the marriage merely on the ground of the husband's social inequality, *i.e.* that his tribe is socially inferior to that of his wife.

(1) 113 P. R. 1907 (*Dadu v. Kadu*).

(2) 43 P. R. 1889 *note* (*Ghulam Shah v. Malak Muzaffar Khan*).

(3) 60 P. R. 1911 (*Sayad Mir Nawab v. Hardeo*).

Ameer Ali's Muhammadan Law, third Edition, Volume II, p. 408 and Baillie's Digest of Muhammadan Law, p. 70, referred to.

1 Agra H. C. R. 130 (1), distinguished.

Held consequently, that inferiority in the social status of the husband does not render such a marriage invalid *ab initio* nor does it justify a Court in dissolving the nuptial tie.

Held further, that as regards ante-nuptial stipulations the law appears to be that when a marriage contract is entered into subject to an essential condition of a reasonable nature, not opposed to the policy of the Muhammadan Law, the Court may set aside the marriage on the breach of that condition, unless the condition has been waived or the breach thereof acquiesced in by or on behalf of the wife.

Second appeal from the decree of A. E. Martineau, Esquire, Additional Divisional Judge, Amritsar Division, at Gurdaspur, dated the 30th March 1914.

Muhammad Rafi, for Appellant.

Mohsin Shah, for Respondents.

The judgment of the Court was delivered by—

8th May 1916.

SHADI LAL, J.—The plaintiff's suit for the restitution of conjugal rights against Mussammat Haidran Bibi and for an injunction against the other defendants has been dismissed by the Additional Divisional Judge on the ground that she being a *Sayad* and the plaintiff not belonging to that tribe, the marriage between them was invalid under the Muhammadan Law. It is beyond dispute that the girl was contracted in marriage by her father, when she was a minor, and the point for determination in this second appeal is whether the marriage contract was invalid *ab initio*, or is liable to be set aside on account of the above inequality between the spouses.

In the case of a wife it is not necessary that she should be the equal of her husband, because a man is not degraded by union with a woman inferior in *status* to him and can raise her to his own rank however high. But the text-writers on Muhammadan Law prescribe various rules prohibiting a woman from marrying a man who is not her equal. The jurists of the *Hanafi* School of Muhammadan Law lay down the following six requisites to equality:—

1. *Nasab*, family or descent.
2. *Islam*.
3. Profession.
4. Freedom.
5. Good character.
6. Means.

In connection with the doctrine of *Nasab* it is stated at page 529 of *Radd-ul-Muhtar*, Volume II, that "the Koreish are each other's equal, but are superior to all other Arabs; so that a Koreishite woman is superior to all other Arabs."

"Other Arabs are each other's equal, but they are superior to all non-Arabs. Even a non-Arab King is not equal to an Arab woman," (*vide* Amir Ali's *Muhammadian Law*, Volume II; Third Edition; page 406).

Now these are salutary rules for the guidance of persons entering into contracts of marriage, but the crucial point before us is whether every one of them is of such a mandatory character that a breach thereof renders the marriage void or leads to its cancellation by a Court of Law in British India. With regard to the second requirement stated above, there can be no manner of doubt that the marriage of a Muhammadan girl with a non-Muhammadan is invalid. There is, however, no cogent reason for holding that the other provisions as to equality are regarded as mandatory. It is a moot point of the *Sunni* Law whether a marriage otherwise lawfully contracted by an adult woman can be, or must be, set aside by a Civil Court at the instance of the so-called guardians (that is of the relatives, who would be guardians, if the woman had been a minor), if they can prove such social inequality on the part of the bridegroom, as would injuriously affect the family credit or interest. But the doctrine of the *Shia* School is clear that social inferiority on the part of the husband affords no ground for the cancellation of the marriage.

We are, however, dealing with a case in which a girl not *sui juris* was given in marriage by her father, and the question is whether she can avoid it on the ground of the husband's social inequality. Suppose, a Muhammadan marries his daughter to a Muhammadan believing that the latter is a *Qazi*, or a man of unimpeachable character, or possessed of wealth, and it subsequently transpires that he was labouring under a mistake as to the profession, good character, or means of his son-in-law; can it be seriously urged that, apart from the question of fraud, the marriage once duly solemnized is liable to be cancelled on the ground of the discovery of true facts. The same remark would apply to the non-compliance with the requirement as to *Nasab*. Indeed, Mr. Mohsin Shah for the respondents admits that the difference in caste, or a mistaken idea as to the social status of the husband, would not, *per se*, be a ground for cancelling the marriage; but he contends that when social inequality is reinforced by a special

ante-nuptial contract containing an assurance on the part of the husband as to his tribe, the Court would be justified in dissolving the marriage tie in the event of the non-fulfilment of the stipulation. That is, however, a matter, which has not been adjudicated upon by the lower Appellate Court, and in the absence of a finding on certain facts bearing upon the question we are unable to pronounce an opinion thereon.

In support of the finding on the question of law arrived at by the learned Judge, no judicial authority has been cited before us, and we are aware of none, which lays down the rule that a marriage otherwise valid can be annulled on the ground of the husband's tribe being socially inferior to that of his wife. The judgment in 1, Agra High Court Reports, 130 (1), does not specify the inequality relied upon in that case, and the report shews that the learned Judges without deciding the point remitted the case to the Lower Court with the direction that it should ascertain "whether there was any such inequality between the parties to the marriage, as "would render the consent of the bride's guardian a necessary "condition to the validity of the marriage, or would authorize "him to interfere and set it aside, and if such inequality existed, "whether the bride's father sanctioned the marriage or not."

It seems to us that there must have been many instances of inter caste marriages among the Muhammadans, and the fact that there has not been any reported decision dealing with the matter goes to shew that the alleged defect has not been regarded as fatal. Indeed a passage of the *Fatawa Alamgiri*, as quoted in Ameer Ali's *Muhammadan Law*, page 408, declares that "except *Islam* and freedom, equality in any other respect "is not invariably observed in a country other than Arabia." And under the law as administered by the British Courts the only essential condition is that the husband must profess the Muhammadan religion. We are fortified in the conclusion we arrive at, by the following extract from Baillie's *Digest of Muhammadan Law* at page 70 : "if a woman should contract "herself in marriage to a man, not knowing whether he is her "equal or not, and not stipulating for equality, and should "afterwards be informed that he is not her equal, she has "no option, but her guardians have an option; and if the "guardians are the parties, who enter into the contract on "her behalf, and with her consent, being themselves ignorant "whether the man was her equal or not, none of them has "any option in the matter, unless equality is expressly stipulated "for, or the guardians are told that the man is the equal of

“ the woman, in which case, if it should subsequently transpire
“ that he is not her equal, they would have an option.”

For the foregoing reasons we are of opinion that the inferiority in the social status of the husband does not render the marriage invalid *ab initio*, nor does it justify the Court in dissolving the nuptial tie.

As regards the ante-nuptial stipulation referred to above, the law appears to be that when a marriage contract is entered into subject to an essential condition of a reasonable nature, not opposed to the policy of the Muhammadan Law, the Court may set aside the marriage on the breach of that condition, unless the condition has been waived, or the breach thereof has been acquiesced in by or on behalf of the wife. This question, and the further question whether, in the event of its refusal to annul the marriage, the Court, in view of all the circumstances, should grant the discretionary remedy by way of restitution of conjugal rights, are matters which should be determined by the lower Appellate Court after considering all the relevant facts.

Upon the question of law we are unable to sustain the finding against the appellant.

Accordingly we accept the appeal, and reversing the decree we remand the case under order 41, rule 23, for decision on the remaining points. The Court-fee on the memorandum of appeal shall be refunded, and other costs shall be costs in the cause.

Appeal accepted.

No. 120.

*Before Hon. Mr. Justice Shadi Lal, and Hon. Mr. Justice
LeRossignol.*

PAL SINGH—(PLAINTIFF)—APPELLANT,

Versus

THAKAR SINGH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 2359 of 1914.

Punjab Alienation of Land Act, XIII of 1900, sections 3 (2), 4, 14 and 17 (2)—member of an agricultural tribe qua a particular district—agreement to sell subject to there being no legal obstacle—want of sanction of Deputy Commissioner.

Defendant T. S., a Jat of the Lyallpur district, promised to sell the land in dispute situate in *tahsil* Jaranwala, district Lyallpur, to the plaintiff P. S., a Jat of the Hoshiarpur District, and on 5th January 1914 the former executed an agreement containing *inter alia* the stipulations that the sale deed would

be executed and registered by the 21st February 1914, that the party committing breach of the contract would pay Rs. 1,000 as damages to the other and that if there was any legal obstacle to the execution and registration of the sale deed neither party would be entitled to any damages. Defendant refused to execute the sale deed by the prescribed date and consequently on the 24th February 1914, plaintiff instituted the present suit for specific performance of the contract and possession of land, sanction of the Deputy Commissioner to the sale was not obtained till after the institution of the suit.

Held, that as plaintiff neither held land nor resided in the Lyallpur District he was not a member of an agricultural tribe *qua* that district and was not entitled to purchase the land without the sanction of the Deputy Commissioner.

Local Government Notification No. 63, dated 18th April 1904 under section 4 of the Punjab Alienation of Land Act, referred to.

Held also, that as under sub-section 2 of section 17 of the Act, the deed of sale could not have been admitted to registration until a certified copy of the order granting such sanction was produced to the officer empowered to register the instrument and as no such sanction was forthcoming on the 21st February and in fact no application for sanction had up to that date been made there was a legal obstacle and the defendant under the agreement was accordingly entitled to put an end to the contract and by refusing to carry it out he did put an end to it and the fact that defendant subsequently obtained sanction afforded no justification for reviving the *vinculum juris*.

First appeal from the decree of Lala Ganga Ram Soni, District Judge, Lyallpur, dated the 14th July 1914.

Sheo Narain, for Appellant.

Lall Muhammad Datta, for Respondent.

The judgment of the Court was delivered by—

11th May 1916.

SHADI LAL, J.—The defendant, Thakar Singh, a Jat of the Lyallpur District, promised to sell the land in dispute situate in *tahsil* Jaranwala, district Lyallpur, to the plaintiff Pal Singh, a Jat of the Hoshiarpur District; and on the 5th January 1914, the former executed an agreement containing, *inter alia*, the stipulations that the sale deed would be executed and registered by the 10th Phagan, Sambat 1970, corresponding to 21st February 1914, that the party committing a breach of the contract would pay Rs. 1,000 as damages to the other, and that if there was any legal obstacle to the execution and registration of the sale-deed, neither party would be entitled to any damages. Upon the defendant's refusal to execute and register the sale-deed by the prescribed date, the plaintiff instituted, on the 24th February 1914, the present suit for the specific performance of the contract and for the possession of the land. The District Judge has dismissed the suit on the ground that, neither on the 21st February, nor on the date of the institution of the suit, was the plaintiff a member of an agricultural tribe

in the Lyallpur District, that he could not, therefore, purchase the land without the sanction of the Deputy Commissioner, which sanction was obtained only during the pendency of the suit, and that, there being a legal obstacle to the registration of the document, the stipulation between the parties absolved the defendant from his obligation under the agreement. Against the decree dismissing his suit the plaintiff has preferred a first appeal to this Court, and after hearing arguments on both sides we are of opinion that the conclusion reached by the learned Judge is correct, and that this appeal must fail.

It is clear that in order to be a member of an agricultural tribe in a particular district, a person must satisfy two conditions :

(a) he must belong to one of the tribes notified as agricultural tribes for that district ; and

(b) he must either hold land, or reside, in that district. Now, in the case before us the plaintiff Pal Singh, being a Jat, fulfils the first requirement, but he is neither a holder of land, nor a resident, in the Lyallpur District. It follows that he is not a member of an agricultural tribe *qua* the Lyallpur District, and is not entitled to purchase the land situate therein without the sanction of the Deputy Commissioner. The learned advocate for the appellant contended that the second condition referred to above was contained only in a circular letter issued by the Financial Commissioner, and that, as it represents the view of that officer, the Civil Courts are not bound by that expression of opinion. Now, this argument proceeds upon an ignorance of the existence of a notification issued by the Local Government under section 4 of the Punjab Alienation of Land Act, to which notification we drew the attention of the learned Advocate, and the terms of which do not admit of the slightest doubt. The notification in question, No. 63, dated 18th April 1904, makes ordinary residence or the holding of land in the district a *sine qua non* to the acquisition of the status of a member of an agricultural tribe in that district ; and it is beyond doubt that in pursuance of the authority conferred upon it by the Legislature the Local Government was fully empowered to define the expression " agricultural tribe."

Accordingly we hold that Pal Singh, who admittedly neither resides nor holds land in the Lyallpur District, is not a member of an agricultural tribe therein, and that under section 3, sub-section 2 of the Act a permanent alienation of land made by a member of an agricultural tribe in his favour could not take effect as such, unless and until sanction was given thereto by the Deputy Commissioner. The language of that sub-section read with the proviso allowing sanction to be accorded to a

permanent alienation after it is otherwise completed, shows that the Legislature did not intend to render a permanent alienation by a member of an agricultural tribe to a non-member void *ab initio*. If such a transfer is subsequently sanctioned by the Deputy Commissioner, it takes effect as a permanent alienation; otherwise under section 14 it may be converted into a usufructuary mortgage in form (a) permitted by section 6 for such term not exceeding twenty years, and on such conditions, as the Deputy Commissioner considers to be reasonable.

But this discussion need not be pursued any further, because as observed above, the parties specified the 21st February 1914 for the completion of the sale-deed, and stipulated in express terms that in the event of a legal obstacle to the execution and registration of the document neither party would be entitled to damages. Now section 17, sub-section 2 of the Act provides that an instrument which gives effect to a transaction requiring the sanction of the Deputy Commissioner shall not be admitted to registration until a certified copy of the order granting such sanction is produced to the officer empowered to register the instrument; and it is clear that on the 21st February no such sanction was forthcoming, nay, even an application for sanction had not up to that time been made. It is, therefore, beyond dispute that even if the defendant had executed a sale-deed, he could not have obtained the registration of the instrument. It seems to us that he was not bound to wait indefinitely for the sanction of the Deputy Commissioner to be obtained thereafter and that under the agreement he was entitled to put an end to the contract, and it appears that by refusing to carry it out he did put an end to it. Consequently, we hold that on the 21st February he did not commit any breach, for which he was liable in a Court of Justice, and that the plaintiff had no cause of action on the date when he brought the action. That during the pendency of the suit he applied on the 8th April for sanction and obtained it the next day obviously affords no justification for reviving the *vinculum juris*, which had been already dissolved with impunity. The plaintiff had no actionable claim either on the day in question, or on the day when he instituted the suit and the improvement in his position *pendente lite* cannot have the effect of depriving the defendant of the option conferred upon him by the very contract, upon which the plaintiff rests his claim.

For the aforesaid reasons we concur in the decision of the District Judge, and dismiss the appeal with costs.

Appeal dismissed.

No. 121.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Shadi Lal.*

KHADIM HUSSAIN—(PLAINTIFF)—APPELLANT,

Versus

SHER MUHAMMAD AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 2453 of 1913.

Custom—succession—by widow—collaterally—Pathans—Jullundur City.

Held, that by custom among Pathans of Basti Mithu, a suburb of Jullundur City, the widow of a deceased proprietor is entitled to succeed to his collateral's estate in the same way as her deceased husband would have done if he had been living.

Authorities cited under paragraph 11, remark II of Rattigan's Digest of Customary Law, 8th edition, and 32 P. R. 1915 (1), referred to, also 1 P. R. 1907 (2) and 126 P. R. 1912 (P. C.) (3).

77 P. R. 1893 (4), dissented from.

*Second appeal from the decree of O. F. Lumsden, Esquire,
Divisional Judge, Jullundur, dated the 26th August 1913.*

Muhammad Shafi, for Appellant.

Fazal-i-Hussain and Obedullah, for Respondents.

The judgment of the Court was delivered by—

SHADI LAL, J.—The sole question for determination in this appeal is whether among the Pathans of Basti Mithu, a suburb of Jullundur City, the widow of a deceased proprietor is entitled to succeed to his collateral's estate, in the same way as her deceased husband would have done, if he had been living. The Courts below have answered the question in the affirmative, and after examining the evidence adduced by both the parties we have no hesitation in endorsing their view. 21st April 1916.

A reference to the authorities cited under paragraph 11, remark II of Rattigan's Digest of Customary Law, 8th edition, shews that with the exception of No. 77 P. R. 1893, (4) which has been expressly dissented from in subsequent judgments, all the published rulings, nearly 20 in number, are in favour of widow's right of collateral succession, and the recent pronouncement on the subject is contained in the judgment of a Division Bench of this Court reported as

(1) 32 P. R. 1915 (*Mussammat Sultan Bibi v Ghulam Haidar Khan*).

(2) 1 P. R. 1907 (*Muhammad Niaz-ud-Din Khan v. Muhammad Umar Khan*).

(3) 126 P. R. 1912 (P. C.) (*Muhammad Umar Khan v. Muhammad Niaz-ud-Din Khan*).

(4) 77 P. R. 1893 (*Mussammat Aso v. Mussammat Tabi*).

No. 32 *P. R.* 1915, (1) which relates to the Pathans of this very district. In this judgment the learned Judges, upon an examination of the previous authorities, came to the conclusion that among the dominant tribes of the Jullundur Doab there is a presumption in favour of the collateral succession of widows, and that the rulings referred to by them afforded a sufficient material for shifting the *onus* of disproving a widow's right of collateral succession to the opposite party.

Having regard to this exposition of the Customary Law, with which we are in full accord, we think it would be an act of supererogation to deal with the previous rulings of this Court afresh. Suffice it to say that the *onus* is on the appellant to prove that the widow is not entitled to succeed collaterally and that the evidence in this case is wholly insufficient to discharge this *onus*.

The instances cited by both the parties have been fully examined by the Courts below, and do not require any elaborate discussion here. The appellant has adduced altogether nine precedents, two judicial, and seven mutation orders. Of the judicial precedents, No. 1 proceeds upon the authority of 77 *P. R.* 1893 (2) which, as observed already, has been expressly dissented from by this Court, and No. 2 does not deal directly with the point, and cannot, therefore, be of much assistance. As regards the mutations, No. 7 is admittedly a case of voluntary renunciation of their rights by the widows, and No. 6 also appears to be of the same nature. No. 9 is a mutation effected in the absence of the widow, whose agent was a consenting party; and Nos. 5 and 8 relate to Ansari Sheikhs, who are governed, in many matters, by their personal law (*vide* No. 1 *P. R.* 1907 (3) and No. 126 *P. R.* 1912 (*P. C.*) (4)). Of the remaining two mutations, No. 4 does not help the plaintiff, as the widow deprived thereby had, it was alleged, instituted a suit to enforce her rights; and No. 3 is an instance in which the widow did not assert her right of succession, and the learned Divisional Judge is not wrong in presuming that it wast the result of a family arrangement. It will thus be seen that the precedents cited by the appellant are all susceptible of explanation, and that the majority of them are of no value whatsoever. Upon this slender material we are unable to hold that the appellant has discharged the *onus* which rested upon

(1) 32 *P. R.* 1915 (*Mussammat Sultan Bibi v. Ghulam Haidar Khan*).

(2) 77 *P. R.* 1893 (*Mussammat Aso v. Mussammat Tabi*).

(3) 1 *P. R.* 1907 (*Muhammad Niaz-ud-Din Khan v. Muhammad Umar Khan*).

(4) 126 *P. R.* 1912 (*P. C.*) (*Muhammad Umar Khan v. Muhammad Niaz-ud-Din Khan*).

him. *Per contra*, there are four clear instances in favour of widows' succession, two from the Jullundur District and two from the neighbouring district of Hoshiarpur, the Pathans of which, it is to be noted, intermarry with the Pathans of the Basti in question and of other Bastis situate near the town of Jullundur.

The result is that, in the absence of satisfactory evidence to the contrary, the widow's right to succeed collaterally must be upheld. We accordingly confirm the decree of the Lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

No. 122.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice LeRossignol.

TAJ MUHAMMAD—(PLAINTIFF)—APPELLANT,

Versus

SAYAD MUHAMMAD AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 590 of 1913.

Custom—Alienation—will—Arains of Jullundur City—power of testation governed by same rules as power of gift—Muhammadan Law.

Held, that the Arains being an agricultural tribe are presumably governed in matters of testamentary and intestate succession by the ordinary customary law and this presumption is not rebutted, though its force is weakened, by the fact that the ancestor of the family concerned and his descendants instead of adopting agriculture as their profession became employees of sorts in the Kapurthala State and other places.

Held also, that it is a well recognised principle of law that the power of alienation *inter vivos* and the power of testation go together, and that if in a particular case the former is proved to be governed by custom the latter is presumed to follow the same rule.

110 P. R. 1906 (F. B.) (1), distinguished.

Held accordingly on the evidence produced, that the parties are governed by custom in matters of alienations by will as well as by gift, in regard to both ancestral and self-acquired property.

Second appeal from the decree of L. H. Leslie Jones, Esquire, Divisional Judge, Jullundur, dated the 6th January 1913.

Sheo Narain, for Appellant.

Muhammad Iqbal, for Respondents.

The judgment of the Court was delivered by—

SHADI LAL, J.—One Mubarik Ali of the Jullundur City 8th May 1916.
executed a will, by which he gave his entire estate to the

defendant Sayad Muhammad, a stranger to the family, subject to a life interest in half of it in favour of his widow. The plaintiff, who is an heir *ab intestato* of the deceased Mubarik Ali, claims his share in the estate, alleging that under the Muhammadan Law, by which the latter was governed, the testament executed by him is invalid, except to the extent of one-third of the estate. The Courts below have held that the family, to which the testator belonged, is of the Arain tribe, that it is governed by ordinary agricultural custom of the Punjab, and that the will is valid, so far as the self-acquired property is concerned. Upon these findings the learned Divisional Judge has decreed the suit with respect to a share in one house, holding the same to be ancestral, and has dismissed it as regards the remaining property, which he has found to be self-acquired *qua* the plaintiff.

Against this decision the plaintiff has filed a second appeal and upon the certificate granted by the learned Divisional Judge the only point for decision is whether custom as opposed to Muhammadan Law supplies the rule of decision. Now, the Courts below have, after a careful survey of the entire evidence on the record, reached the conclusion that the testator was an Arain, and that the original home of the family was Vairawal in the Amritsar District, from which they migrated to Jullundur. This is a finding of facts, and cannot be impeached on second appeal. The Arains being an agricultural tribe in the Province, we start with the initial presumption that the members of this family, like other agricultural tribes, are governed in matters of testamentary and intestate succession by the ordinary customary law; and this presumption is not rebutted, though its force is weakened, by the fact that Hidayat Ullah, the ancestor of the family, and his descendants, instead of adopting agriculture as their profession, became employés of sorts in the Kapurthala State and other places. The learned Judge of the Lower Appellate Court is right in thinking that the members of the family at some remote time probably cultivated land, and that custom, rather than the personal law, was applicable to them at that time at any rate.

Further, it is sufficiently clear that the family does not follow Muhammadan Law as regards intestate succession. In fact, we have instances showing that the widows in the family get only life estates, that the daughters are excluded by the sons, and that the rule of representation is observed in practice. These instances have not been seriously contested by the learned Advocate for the appellant. In respect of alienation, the same remark cannot be made with equal certainty; but we

are disposed to agree with the lower Courts that the oral and documentary evidence points to the conclusion that an alienation of ancestral property is liable to be controlled by a collateral of the alienor, descending from the common ancestor who originally owned it. If ancestral property cannot be disposed of by an alienation *inter vivos*, it follows that it cannot be transferred by a will. Similarly, if self-acquired property can be validly alienated by a transaction to take effect in the alienor's lifetime, there is no valid reason why a different rule should apply, if the owner proceeds to give it away by will. It is a well recognized principle of law that the power of alienation *inter vivos* and the power of testation go together, and we think that if in a particular case the former is proved to be governed by custom, the latter is presumed to follow the same rule.

We are fully aware of the abstract proposition of law laid down in 110 P. R. 1906 (Full Bench) (1) that, apart from the particular facts of a case, the onus lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and that it is not sufficient to show that in regard to certain other matters he is governed by custom. But the onus shifts at once, when we deal with a tribe, which is one of the dominant agricultural tribes in the Province, and to which the ordinary agricultural custom is generally applicable; more especially when we find that all the instances are in accordance with custom, and that in the matter of alienation *inter vivos*, which is so closely connected with the power of testation, the principles of customary law have been followed. In the conclusion reached by us we are fortified by the fact that there is not a single instance in the family showing that Muhammadan Law has ever been observed in any matter, whether succession or alienation.

For these reasons we are of opinion that the decision of the lower Courts on the only point in controversy in this second appeal must be accepted. We accordingly confirm the decree and dismiss the appeal with costs. The cross objections have been expressly abandoned by the learned counsel for the respondents, and are consequently rejected with costs.

Appeal dismissed.

(1) 110 P. R. 1906 (F. B.) (*Daya Ram v. Soheli Singh*)

No. 123.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice LeRossignol.

MUSSAMMAT KEWATI AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

CHANDU LAL—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 2226 of 1912.

Hindu Law—Adoption—not revocable—will—disposing mind—testator suffering from plague—proper amount of maintenance of widow, and right of residence.

Held, that an adoption once validly made cannot be revoked subsequently.

Held also, that it was unlikely that a person suffering from a virulent type of plague (from which he died within 3 days from the date of the will) had sufficient mental capacity to comprehend the extent of his estate and the nature of the claims of those whom he was excluding from all participation in the property, and that his will was consequently invalid.

Held further, that a Hindu widow is entitled to a suitable residence and also to a fixed recurring sum for her maintenance and that in fixing the amount of maintenance provision must be made for her reasonable wants, namely for the purpose of charities and the discharge of religious obligations in addition to a reasonable provision for her food, raiment and lodging, having regard to the amount of the estate which is liable for her maintenance, her position in life and the circumstances of the family.

First appeal from the decree of Sardar Ali Hussain Khan, Kazilbash, District Judge, Karnal, dated the 20th August 1913.

Fazal-i-Hussain, for Appellants.

Beechey and Moti Sagar, for Respondent.

The judgment of the Court was delivered by—

13th May 1916.

SHADI LAL, J.—This appeal arises out of an action brought by one Chandu Lal for the possession of the estate held by his adoptive father, Naurang Mal, who died of plague on the 20th December 1910. The claim was resisted mainly by his widow Mussammat Kewati, who propounded a will alleged to have been executed by the deceased on the 17th of December, three days before his death; the remaining defendants were impleaded on account of their being in possession of some moveable and immoveable properties belonging to the estate. The District Judge finding against the due execution of the will by Naurang Mal has decreed the suit in respect of the immoveable property, account books, and Rs. 1,515, and dismissed the rest of the claim including a sum of Rs. 5,000, alleged to have been paid by the widow to the other defendants.

Upon this appeal preferred by the defendants it is admitted that the plaintiff was duly adopted by Naurang Mal, and the proposition of law is firmly established that an adoption once validly made cannot be revoked subsequently. The real matter in controversy between the parties relates to the execution and the validity of the testament by the deceased Naurang Mal. We have heard lengthy arguments on this point, and examined the evidence carefully in the light of the comments made by Mr. Fazal-i-Hussain for the appellants and Mr. Moti Sagar for the respondent. We consider it unnecessary to deal *in extenso* with the oral evidence, because it appears to us that the broad facts of the case, which do not admit of any serious doubt, militate against the theory that the testator had a disposing mind. We are disposed to think that the document, Exhibit D-A, which devises the whole of the estate to the widow in absolute ownership and disinherits the adopted son, was probably executed in Naurang Mal's lifetime. Apart from the oral evidence we have in support of it an entry as to its execution in the scribe's register. This entry, which is about the middle of a page, is preceded and followed by the entries relating to documents executed by other persons, and it is difficult to believe that all these persons entered into a conspiracy, and forged, after Naurang Mal's death, a leaf in the register in order to permit of an entry in respect of the will being made in the position which it now occupies.

We are, however, not prepared to hold that the said will gives expression to the wishes of Naurang Mal, or that he was in his proper senses at the time of its execution. It is undeniable that he died of bubonic plague on the 20th December, and the evidence of Lala Ram Chandar, Pleader of Karnal, who went from Karnal to Thanesar to conduct on the 16th December a criminal case on behalf of the deceased, makes it abundantly clear that Naurang Mal, who travelled with him in the same train to Thanesar, had high fever on that day and could not sit up. The witness deposes that the deceased, though not unconscious, was not in his proper senses; and it appears that the judicial officer, before whom the case came up for trial, objected to his presence in the Court room on the ground that he had plague. Upon this unimpeachable testimony there can be very little doubt that Naurang Mal was on that day suffering from plague in its initial stage, and it is common ground that he succumbed to it within four days. The testament is alleged to have been executed on the 17th of December, and we consider it unlikely that a person suffering

from a virulent type of plague had sufficient mental capacity to comprehend the extent of his estate, and the nature of the claims of those whom he was excluding from all participation in the property. It is true that the deceased was displeased with his adopted son, but there is no evidence to shew that he ever expressed any intention of disinheriting him altogether.

The propounder of the will has produced the scribe and the attesting witnesses to prove that the deceased was in possession of his senses ; but the witnesses are not at all disinterested, and their testimony, which has been discussed by the Lower Court, does not appear to us satisfactory. There is not a single impartial witness of any status, who has come forward to depose to the mental condition of Naurang Mal on the 17th of December, or to the execution of the will, and it is a remarkable circumstance that, though the widow and her brothers must have known that the testament was likely to be contested by the plaintiff, they did not adopt the ordinary precaution of getting it registered by the Sub-Registrar, or attested by a medical officer.

The thumb-marks on the document are blurred, and it is doubtful whether the signatures at two places purporting to be those of the testator are really his. We do not wish to be positive on the point, but it appears to us that there is a marked difference in the style and the formation of letters between the disputed handwriting and the admitted signature of the deceased.

Now, it has been held over and over again that "it is not sufficient in order to make a will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called a disposing mind ; he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible will, or a reasonable will or a kind will. . . . But he must be able to understand his position, he must be able to appreciate his property, to form a judgment with respect to the parties whom he chooses to benefit by it after his death, and if he has capacity for that, it suffices."

Upon a careful consideration of the evidence and the circumstances of the case we are of opinion that the appellants have failed to prove the due execution of the will in the sense indicated above. This finding renders it unnecessary to pronounce our opinion upon the point whether the property was

ancestral *qua* the testator, and whether he could not consequently validly dispose of it without the consent of the plaintiff, who with the testator formed a joint Hindu family.

The plaintiff having thus removed the impediment in his way is clearly entitled to the property held by the deceased. As regards the various properties mentioned in the plaint, we observe that the defendants disputed the plaintiff's title to house No. 22, which is asserted to be the sole property of defendant No. 2, and also to 7/8ths share of house No. 11. Upon the record there is not an iota of evidence to prove the ownership of one party or the other in the disputed property. In reply to the appellants' prayer for a remand, Mr. Moti Sagar for the respondent contends that issues Nos. 3, 4 and 5 are wide enough to include the question of title to all the houses, and that the appellants are not entitled to a further opportunity for producing evidence in respect thereof. There can be no manner of doubt that both the parties were fully aware of what they were required to prove, and that they have not been prejudiced by the cryptic wording of the issues framed by the District Judge. The plaintiff, being out of possession, the *onus* clearly lies upon him to prove his own title, or that of his adoptive father, and this he has failed to discharge. That being the case, his claim in respect of house No. 22 and 7/8ths share of house No. 11 must be dismissed on the short ground that there is no evidence in support of his title.

As regards the question of maintenance and residence there can be no doubt that under the Hindu Law Mussammatt Kewati is entitled to a suitable residence and also to a fixed recurring sum for her maintenance. The rule of law is clear that in fixing the amount of maintenance for a widow provision must be made for her reasonable wants, namely for the purpose of charities and the discharge of religious obligations, in addition to a reasonable provision for her food, raiment and lodging, having regard to the amount of the estate, which is liable for her maintenance, her position in life, and the circumstances of the family. Mussammatt Kewati as defendant in this case did not, however, raise any plea relating to her maintenance and residence, and no enquiry was consequently made on this point. It appears that at the time of the arguments in the lower Court the matter was mentioned by her counsel, but the Court declined to entertain it at that late stage. In order to avoid further litigation we asked the learned counsel on both sides to settle the question privately, but they expressed their inability to arrive at any satisfactory

solution. The material on the record does not afford us any real assistance in fixing the amount of maintenance, or in selecting a suitable house for residence. In these circumstances we are constrained to hold that this dispute must be settled privately by the parties themselves or in a suit properly framed for that purpose

The result of the above discussion is that we modify the decree so far as to omit therefrom house No. 22 and 7/8ths share of house No. 11, and maintain the decision of the Lower Court in all other respects. The appeal is accepted *pro tanto*, and the parties, in view of all the circumstances of the case, are directed to pay their own costs throughout the litigation. This decree does not affect the widow's right of residence and maintenance, which, as observed already, must be determined in another suit.

Appeal accepted.

No. 124.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Cheris.*

GANGA RAM AND ANOTHER—(DEFENDANTS)—
APPELLANTS,

Versus

RAJA RAM AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1128 of 1915.

Punjab Pre-emption Act, I of 1913, sections 9, 21 (2) and 24—pre-emption in respect of sale sanctioned by Deputy Commissioner and sale without proper sanction—Punjab Alienation of Land Act, XIII of 1900, sections 3 (2), 5 and 21 (2)—Jurisdiction of Civil Court to inquire into manner in which Deputy Commissioner exercises his powers.

Held, that section 9 of the Punjab Pre-emption Act, 1913, must be held to repeal by implication so much of section 5 of the Punjab Alienation of Land Act, 1900, as conflicts with itself and consequently no right of pre-emption exists in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the latter Act.

Maxwell on the Interpretation of Statutes, 4th edition, pp. 236 and 237, referred to.

Held also, that a Civil Court is debarred from taking cognisance of the manner in which the Deputy Commissioner exercises his powers under the Alienation of Land Act, *vide* section 21 (2) of that Act.

Held further, that if there is no valid sanction the sale in question is opposed to the provisions of the Land Alienation Act, and in this case section 24 of the Pre-emption Act requires that the suit for pre-emption shall be dismissed.

First appeal from the decree of A. Seymour, Esquire, Senior Subordinate Judge, Ambala, dated the 11th February 1915.

Sewa Ram Singh and Balwant Rai, for Appelants.

Marghub Ahmad, for Respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—This is a suit for pre-emption of land which was sold by an agriculturist to non-agriculturists with sanction of the Deputy Commissioner given under section 3 (2) of the Land Alienation Act. The Lower Court, overruling a plea that section 9 of the Pre-emption Act of 1913 took away all right of pre-emption in such a case, decreed the claim. Defendants appeal to this Court. 20th May 1916.

The learned Subordinate Judge holds that section 9 of the Pre-emption Act, which lays down that no right of pre-emption shall exist in respect of any sale sanctioned by the Deputy Commissioner under section 3 (2) of the Punjab Alienation of Land Act, does not over-ride the provisions of section 5 of the Land Alienation Act, which section provides, *inter alia*, that the Deputy Commissioner's sanction shall not affect any question relating to a right of pre-emption. There is certainly nothing in the Pre-emption Act which states precisely that section 5 of the Land Alienation Act is not still in full force, but, granting that section 5 of the latter Act is in conflict with section 9 of the Pre-emption Act (though appellants' counsel does not admit that there is any such conflict) we have no hesitation in holding that section 9 of the Pre-emption Act repeals by implication so much of section 5 of the Land Alienation Act as conflicts with itself (See Maxwell on the Interpretation of Statutes, 4th edition, pages 236 and 237).

Then counsel for respondent further argues that the Deputy Commissioner did not make proper enquiry as required by section 3 (3) of the Land Alienation Act, but we cannot go into this, for section 21 (2) of the same Act debars all Civil Courts from taking cognizance of the manner in which the Deputy Commissioner exercises his powers under the Act.

Then it is urged that the sanction is no proper sanction, being initialled only and not signed in full by the Deputy Commissioner. But this plea is futile, for if there is no valid sanction the sale in question is opposed to the provisions of the Land Alienation Act, and in this case section 24 of the Pre-emption Act requires that the suit for pre-emption shall be dismissed.

* * * * *

We accept the appeal and reversing the Lower Court's decree we dismiss the suit with costs in both Courts.

Appeal accepted.

No. 125.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Chevis.*

NUR MUHAMMAD—(DEFENDANT)—APPELLANT,
Versus

KHUDA BAKHSH—(PLAINTIFF)—RESPONDENT.

Civil Appeal No 6 of 1912.

Custom—succession—widow's estate—Parachas of Makhad, Attock District—Muhammadan Law—presumption that widow, taking whole of her husband's estate, takes for life only.

The parties concerned in the suit were Parachas of Makhad, a large village or small town on the Indus in the Attock District. They are known as enterprising traders, travelling on business into Central Asia and other foreign places.

Held, that it had been proved that by custom prevailing among the Parachas concerned in the suit a widow only takes the usual life estate and no share under Muhammadan Law.

15 P. R. 1909 (1) and 110 P. R. 1906 (F. B.) (2), distinguished.

Held also, that in the Punjab where a widow takes the whole of her husband's estate there is a presumption that she takes only for life.

74 P. R. 1902 (p. 286) (3), 54 P. R. 1903 (p. 219) (4) and 14 P. R. 1911 (5), referred to.

First appeal from the decree of Lala Pohu Ram, District Judge, Attock, dated the 29th November 1911.

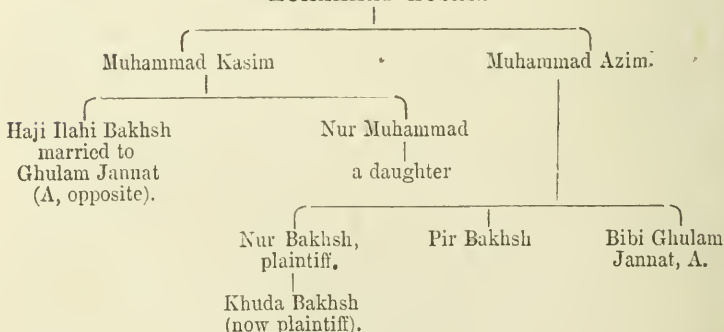
Muhammad Shafi, for Appellant.

Sheo Narain, Jalal Din and Pir Taj-ud-Din, for Respondent.

The judgment of the Court was delivered by—

SIR DONALD JOHNSTONE, C. J.—A brief pedigree-table will help to make our judgment intelligible.

MUHAMMAD HUSAN.



(1) 15 P. R. 1909 (Ghulam Hassan v. Fazal Din).

(2) 110 P. R. 1906 (F. B.) (Daya Ram v. Sohail Singh).

(3) 74 P. R. 1902 (p. 286) (Muhammad Anwar-ul-Haq v. Habibul Rahman).

(4) 54 P. R. 1903 (p. 219) (Muhammad Hussain v. Sultan Ali).

(5) 14 P. R. 1911 (Mir Haidar v. Muhammad Ali).

20th May 1916.

The large property in suit belonged to Haji Ilahi Bakhsh, who died leaving a widow Ghulam Jannat, sister of Nur Bakhsh, original plaintiff, who claimed that he was sole heir of his sister, who was entitled under Muhammadan Law to $\frac{1}{4}$ of her late husband's estate and who has died and so prayed for a decree for $\frac{1}{4}$ of the late Haji's property. He made Nur Muhammad, sole brother of the late Haji, his defendant, on the ground that the latter was in possession of the whole of that property.

Defendant, on the other hand, pleaded.

(a) that the late Haji had divorced Mussammat Ghulam Jannat;

(b) that the parties do not follow Muhammadan Law in matters of succession but follow a custom, under which widows of sonless men (like the Haji) take their husband's estates on a life-tenure and on the widow's death the property goes to the late husband's heirs;

(c) that there was an oral agreement by Mussammat Ghulam Jannat, whereby she took the sum of Rs. 3,000 and renounced her rights;

(d) that a written deed of compromise was drawn up embodying the above, signed by Khuda Bakhsh (now plaintiff), son of Nur Bakhsh, original plaintiff, as *Mukhtar-i-am* of Nur Bakhsh, in the course of litigation between the Haji and Pir Bakhsh (see pedigree-table).

Plaintiff met these pleas by reiterating his original case, and by contending, (i) that there was no such oral agreement by the lady, (ii) that Khuda Bakhsh had no power to compromise as he did, (iii) that the compromise required registration, and, being unregistered cannot be received in evidence, the property being admittedly over Rs. 100 in value.

Issues were drawn on all these points, and the lower Court found finally for plaintiff. That Court held that the alleged divorce was not established; that the parties follow Muhammadan Law; that the lady never renounced her rights; that Khuda Bakhsh entered into the compromise on behalf of Nur Bakhsh without proper authority and that the latter, therefore, is not estopped from bringing this claim; that the compromise did not require registration; and that plaintiff Nur Bakhsh was entitled to a decree in full with costs.

Defendant has appealed. We first heard Mr. Shafi on his behalf on all the points found against him by the Lower Court, which Mr. Shafi thought it right to contest. He dropped

the allegation of divorce, with which we are, therefore, no longer specially concerned at present; he urged that the parties follow custom and not Muhammadan Law; while waiving the question whether the lady directly renounced her rights, he contended that Nur Bakhsh was bound by the aforesaid compromise, and that still more was Khuda Bakhsh so bound, now that he has become plaintiff *vice* Nur Bakhsh, who had died during the pendency of this appeal; and finally he asked for dismissal of the suit. On the other side we have heard Mr. Sheo Narain on all the issues in the case, and Mr. Taj-ud-Din (who appears for Mussammat Basran, widow of Nur Bakhsh, made a respondent) on the questions of custom *versus* personal law, and of abatement of appeal (on the ground that his client was not made a respondent within the 6 months allowed by law). In reply we asked Mr. Shafi to take up the question of custom first, and having heard him, found that he had made good his contention that the parties follow a custom under which Nur Bakhsh and his son Khuda Bakhsh, have no title whatever to succeed to any part of the late Haji's estate in the presence of appellant, the Haji's own brother. This finding disposes of plaintiff's claim, and therefore the questions regarding the compromise, estoppel, Khuda Bakhsh's authority, exclusion of the compromise by the law of registration, and so forth, need not be discussed at all.

The parties are Parachas of Makhad, a large village or small town on the Indus in the Attock District. They are known as enterprising traders, travelling on business into Central Asia and other foreign places. They claim to be Arabs by origin and to have been Musalmans from the beginning, while Mr. Shafi's instructions are that they were once Khattris, resident in the Punjab, and were converted to *Islam*. This is a controversy, which we have no means of settling; and in our opinion it is not very important, for we have on the record abundant evidence of actual recent practice in matters of succession, and it is on this after all that the appeal must be decided.

A good deal of evidence has been recorded, and Mr. Shafi claims, with reason, that, all through it practices emerge that are opposed to the Muhammadan Law of succession, while not a single instance of division of a dead person's estate according to that law has been sworn to by any witness. He claims that the record establishes—

- (1) that widows are always excluded entirely by sons;
- (2) that, where there is no son but only other relatives, the widow always takes the whole property;

(3) that, where there are more widows than one and one dies, the others take by survivorship, the deceased lady's own heirs not coming in ;

(4) that sons entirely exclude daughters ;

(5) that daughters entirely exclude agnates ;

(6) that on a widow dying and leaving property of her late husband, her brother never succeeds ;

(7) that, when a man dies leaving a mother but no son or widow, the mother succeeds to the whole estate of the son, to the exclusion of all who would come in under Muhammadan Law ;

(8) that, when a widow remarries, she forfeits her late husband's property.

In the present instance, the concrete question is, whether Mussammatt Ghulam Jannat on the death of her husband became full owner of any part of his estate, so that the next heir after her death would be her brother, Nur Bakhsh ; and it is, therefore, clear that of the above points only (2), (3), (6) and (8) are directly relevant. We think it will suffice if we shew that these points are fairly established. Thus, as regards (2), there is authority to the effect that in the Punjab, where a widow takes the whole of her late husband's estate, there is a presumption that she takes only for life.* As regards (3), under Muhammadan Law the surviving ladies would have no right to take by survivorship, but the deceased lady's own heirs would succeed. Point (6) is identical with the question in this case ; if it has been established, plaintiff's claim fails, but in establishing it defendant is entitled to call in the aid also of points (2), (3) and (8). As to (8), under Muhammadan Law remarriage of a widow makes no change whatever in her rights to property she has inherited, if in this tribe remarriage works forfeiture in favour of her late husband's heirs, it follows that widows in this tribe take only an ordinary Punjabi widow's life estate.

Taking each of the four points in turn, as regards (2), we think the following pieces of evidence in the printed paper book support Mr. Shafi, namely—

1. Ghulam Nabi's case, page 32, line 16.

2. Azizullah's case, page 41, last line.

(1) 74 P. R. 1902 (p. 286) (*Muhammad Anwar-ul-Haq v. Habibul Rahman*).

(2) 54 P. R. 1903 (p. 219) (*Muhammad Hussain v. Sultan Ali*).

(3) 14 P. R. 1911 (*Mir Haidar v. Muhammad Ali*).

* 74 P. R. 1902,
p. 286 (1).

54 P. R. 1903,
p. 219 (2).

14 P. R. 11 (3).

3. Muhammad Azam's case, page 42, line 23.

4. Muhammad Hasan's case } page 43, bottom, and page

5. Muhammad Said's case } 44 top.

Muhammad Azam's case is rather differently described by another witness at page 33, line 11, but the witness at page 42 himself took a share *after the widow's death* and is more likely to have stated the facts correctly; and see page 34, top.

As to (3), we have only the case of the widows Bakht Bhari and Bhagbhari, page 33, line 17.

As to (6), we have Mussammat Faizana's case, page 34, line 12; Mussammat Satarau's case, page 37, line 7; Mussammat Aishan, page 39, bottom; Mussammat Bhagbhari's case, page 44, lines 10—20; Hafiz Nur Muhammad's widow's case, page 44, line 30; page 45, line 8 (Mussammat Shahana's case).

And there are several instances of point (8), *e.g.*, page 35, line 11; page 35, line 25; page 35, line 27; page 41, first line; and so forth. Repeatedly witnesses of both sides have to admit directly or indirectly that remarriage of a widow works forfeiture.

Now it is quite true that all these instances are supported by oral testimony; but in the practically complete absence of rebuttal we are disposed to allow them much weight. We find it hard to hold that, in a case in which the apologists of personal law can give, even through the mouth of a witness virtually not a single instance of obedience to that law, it is right to find the parties to be governed by that law. Again, though such rulings as 110 *P. R.* 1906 (1) (Full Bench) warn us against finding that, because a certain rule of Punjab Agricultural custom is found to exist in a tribe, it follows that a certain other distinct rule of such custom must also be followed, we think that, where there is a respectable body of evidence in favour of a rule of succession in controversy, the fact that, in other matters connected with succession, the parties appear to follow such custom, is certainly some support to the party relying on custom.

Mr. Sheo Narain quotes 15 *P. R.* 1909 (2), as showing that, even where it is shown that sons exclude daughters, it is rash to conclude that other rules of custom in supersession of personal law have been adopted; but here we find for appellant without touching point (4), of which there are some dozen instances on the record.

(1) 110 *P. R.* 1906 (*F. B.*) (*Daya Ram v. Sohel Singh*).

(2) 15 *P. R.* 1909 (*Ghulam Hassan v. Fazal Din*).

Finding, then, that plaintiff is not heir upon the death of his sister Mussammat Ghulam Jannat, inasmuch as she had no legal right to the $\frac{1}{4}$ share in the Haji's estate, which plaintiff claims for her, but was at most entitled to a mere life estate, we hold also that Mussammat Basran, the newly made respondent, has no rights whatever and was not a necessary party to this appeal. We, therefore, accept the appeal, but, in view of the fact that defendant has failed in his plea of divorce, we allow him no costs. Plaintiff's suit is dismissed. Parties to bear their own costs.

Appeal accepted.

No. 126.

*Before Hon. Mr Justice Scott-Smith, and Hon. Mr. Justice
Broadway.*

DAYA NAND ANGLO-VEDIC COLLEGE MANAGEMENT
AND TRUSTS SOCIETY—(OBJECTORS)—APPELLANTS,

Versus

SECRETARY OF STATE FOR INDIA—RESPONDENT.

Civil Appeal No. 2188 of 1914.

Costs—in Land Acquisition cases.

Held, that costs in matters under the Land Acquisition Act, should be calculated in the same way as in ordinary suits.

I. L. R. 31 Mad. 328 (1) and C. A. No. 144 of 1913 (unpublished), referred to.

*First appeal from the order of Major A. A. Irvine, Divisional Judge,
Lahore, dated the 27th July 1914.*

Moti Sagar, for Appellant.

Government Advocate, for Respondent.

The judgment of the Court was delivered by—

BROADWAY, J.—Under Punjab Government Notification 25th May 1916. No. 3254-G., dated the 31st October 1912, the Government acquired 7 kanals 5 marlas of land belonging to the Daya Nand Anglo-Vedic Management and Trust Society for the purposes of the Veterinary College and Hospital, and in due course the Land Acquisition Officer gave his award which amounted to Rs. 5,252. The Daya Nand Anglo-Vedic College objected to this price and put in a claim amounting to Rs. 14,500 and also claimed compensation for severance. Mr. Durga Das, who then appeared on behalf of the objectors, was

asked to state what amount he claimed as compensation for severance and he undertook to do so by the next hearing. For reasons which are not apparent on the record he did not put in any formal application or make any formal statement showing what amount of compensation the objectors were claiming. But in the course of arguments he stated that the amount so claimed was Rs. 6,000. The Court rejected the objectors' application with costs and in the preparation of the memorandum of costs, apparently through an error, Rs. 335 alone was awarded as pleader's fees, being calculated on the difference between the amount claimed and the amount awarded. The sum of Rs. 6,000 was not included in the calculation. On this the objectors applied to the Court (Divisional Judge, Lahore) asking that the question of costs should be reconsidered, and the Government through the learned Government Advocate, applied that this sum of Rs. 6,000 should also be included in the calculation. After hearing counsel the learned Divisional Judge held that the costs in suits of this nature should be calculated as in ordinary suits. In holding this he followed *I. L. R. 31 Mad.*, page 328 (1) and certain unreported rulings of this Court. He has accordingly held that the pleader's costs as calculated were correct with the exception that the sum of Rs. 6,000 ought to have been included in the calculation and altered the memorandum of costs accordingly, making the total amount payable to Government on account of pleader's fees come to Rs. 454-15-3.

From the above order the Daya Nand Anglo-Vedic Management and Trust Society has filed this appeal, and we have heard Rai Sahib Moti Sagar on its behalf. Mr. Petman has referred us, in addition to the rulings cited before the lower Court to Civil Appeal No. 144 of 1913 in which it was held that costs in matters under the Land Acquisition Act should be calculated in the same way as in ordinary suits. With these decisions we are in accord and are of opinion that the ordinary rule should apply to cases of this kind. Mr. Moti Sagar then urged that in any event, inasmuch as the Rs. 6,000 as compensation for severance was not specifically claimed, this ought not to be included in calculating costs. We are, however, unable to agree with this contention. It is clear that a claim for compensation under this head was definitely made and put in issue, and it is also clear that Mr. Durga Das, on behalf of the objectors, in the course of his arguments distinctly stated that the amount claimed under this head was the sum

(1) (1907) *I. L. R. 31 Mad.* 328 (*Ekambar Gramany v. Muniswamy Gramany*).

of Rs. 6,000. We consider, therefore, that the learned Divisional Judge was right in including this sum as having been a part of the claim advanced by the objectors.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 127.

Before Hon. Mr. Justice Shah Din.

MUHAMMAD ALAM—(DEFENDANT)—APPELLANT,

Versus

MUHAMMAD HAYAT AND OTHERS—(PLAINTIFFS)—
AND ANOTHER—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 521 of 1916.

Custom—Alienation—Gift by sonless proprietor of ancestral land to sister's son in presence of collateral—Gujars of Jhelum tahsil—onus probandi.

Held, that the land in dispute being ancestral, the initial *onus* was on the donee to prove that by custom among Gujars of the Jhelum Tahsil a childless proprietor had the power to make a gift of it in favour of his sister's son in presence of collaterals and that he had failed to discharge this *onus*.

102 P. R. 1893 (1) and Customary Law of the Gujrat District by Capt. Davies, page 71, referred to.

Second appeal from the decree of N. H. Prenter, Esquire, District Judge, Jhelum, dated the 24th November 1915.

Rama Nand, for Appellant.

Jaigopal Sethi, for Respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The facts are fully stated in the judgment of the learned District Judge, who has granted the defendants-appellants a certificate under section 41 (3) of the Punjab Courts Act with reference to the question of custom involved in the suit, *viz.*, whether among Gujars of the Jhelum Tahsil a sonless proprietor can gift his ancestral land to his sister's son. 27th May 1916.

Upon this question, both the Subordinate Judge and the District Judge have concurrently held that the defendants, on whom the *onus* lay, have failed to prove that by custom applicable to the parties the gift of ancestral land made by Nek Alam in favour of his sister's son, Muhammad Alam, is valid in the presence of the plaintiffs who are Nek Alam's collaterals,

and they have accordingly granted a decree to the plaintiffs declaring the said gift to be invalid and ineffectual against the plaintiffs' rights of reversion.

I have heard arguments on both sides and have referred to the oral and documentary evidence on the record bearing on the question of custom involved in the suit, and I am of opinion that the view taken by the Courts below is correct. Both the Courts have held that the land in suit is the ancestral property of the plaintiffs and the donor Nek Alam; and notwithstanding the attempt made by the appellants' pleader to show that the finding of the District Judge as to the land in suit being ancestral is based upon conjectures and upon wrong inferences drawn from the facts disclosed by the record, I have no hesitation in holding that the conclusion arrived at by the District Judge on this point is perfectly sound.

The land in suit being ancestral, it is not disputed that the initial onus lay upon the defendants-appellants to prove that the gift in dispute, being one by a childless proprietor in favour of his sister's son, was valid by the custom applicable to the parties. In my opinion they have entirely failed to discharge this onus. The Jhelum Gujars are an offshoot of the Gujars in the Gujrat District; and there can be no question that among Gujars in the Gujrat District a gift of ancestral land by a childless proprietor to his sister's son is not justified by custom (see Customary Law of the Gujrat District by Captain Davies, page 7; also 102 *P. R.* 1893) (1). A reference to the record of this case shows that the plaintiffs have proved instances showing that among Gujars of the Jhelum Tahsil gifts of ancestral land to daughters, sons-in-law or sisters' sons are invalid by custom and the defendants have not produced even a single well authenticated instance of such a gift being held valid. The statement of custom in the Customary Law of the Jhelum District by Mr. Talbot at page 59 supports the plaintiffs' claim.

I accordingly hold, in agreement with the lower Courts, that the defendants have failed to prove that by custom applicable to them the gift in dispute is valid. The appeal fails and is dismissed with costs.

Counsel's fee Rs 16.

Appeal dismissed.

(1) 102 *P. R.* 1893 (*Maulu v. Fazal Ahmad*).

Full Bench.

No. 128.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
Hon. Mr. Justice Chevis, and Hon. Mr. Justice Shadi Lal.

NIRANJAN NATH—(PLAINTIFF)—APPELLANT,

Versus

AFZAL HUSSAIN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 520 of 1914.

Abatement—order of—whether appealable as a decree—Civil Procedure Code, 1908, section 104, order 22, rules 9 and 43 (1) (k)—Civil Procedure Code, 1882, section 366—difference between old and new Code, and in rulings of High Courts, pointed out.

Held, that under the provisions of the new Code of Civil Procedure a suit abates if the plaintiff dies and no application is made within the prescribed period to bring the legal representatives on the record, and that it is not necessary to make an order that the suit shall abate, as was required under the old Code, section 366. If the Court, however, passes a purely formal order recognising the abatement, which is a *fait accompli*, such order cannot be treated as a decree.

The conflict of authority between the High Courts of Bombay and Madras and of Allahabad pointed out:—*I. L. R. 10 Bom. 220 (1), I. L. R. 18 Mad. 496 (2) and 30 Mad. L. J. 486 (3) and I. L. R. 17 All. 172 (4), I. L. R. 25 All. 206 (5) and 12 All. L. J. 1113 (6)*, referred to.

Held also, that upon such abatement the legal representative may under order 22, rule 9, make an application for the revival of the suit and the only question the Court is thereupon required to determine is, whether the applicant was prevented by any sufficient cause from continuing his suit, and if the decision is in the negative, the aggrieved party is entitled to prefer an appeal against that order under order 43, rule 1 (k) of the new Code.

Held further, that order 22, rule 9 (2) is confined to cases in which abatement takes place by reason of an application not having been made within time to implead the legal representative of the deceased party and that it has no application to cases in which the suit has abated on account of some other cause as *e. g.* when the Court holds that the right to one does not survive or that the death of one of several plaintiffs causes an abatement *in toto*.

31 Indian Cases 4 (*Mad.*) (7), referred to.

And held, that in the latter cases the orders of the Court would be decrees and appealable as such.

Held generally, that when the order of the Court merely recognises an abatement which has already taken place on account of the death of a

- (1) (1885) *I. L. R. 10 Bom. 220* (*Bhikaji Ram Chandra v. Purushotam*).
- (2) (1895) *I. L. R. 18 Mad. 496* (*Subbayya v. Saminadayyar*).
- (3) (1916) *30 Mad. L. J. 486* (*Suppu Nayakan v. Perumal Chetty*).
- (4) (1895) *I. L. R. 17 All. 172* (*Hamida Bibi v. Ali Husen Khan*).
- (5) (1902) *I. L. R. 25 All. 206* (*Mehdi Husain v. Sughra Begam*).
- (6) (1914) *12 All. L. J. 1113* (*Walayat Husain v. Ram Lal*).
- (7) (1914) *31 Indian Cases 4* (*Subramania Iyer Venkataramier*).

plaintiff not followed by an application within 6 months to implead his legal representatives and does not determine any matter in controversy between the parties, it cannot be regarded as a decree. If on the other hand the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy and is not passed upon an application for the revival of the suit made under order 22, rule 9, it amounts to a decree and is appealable as such.

*Second appeal from the decree of Lala Murari Lal, Khosla,
District Judge, Delhi, dated the 16th of December 1913.*

Kanwar Narain, for Appellant.

Muhammad Iqbal, for Respondent.

The judgment of the Full Bench was delivered by—

30th May 1916.

SHADI LAL, J.—The question submitted to the Full Bench is whether “an adjudication directing the abatement of a suit on account of the death of a plaintiff” amounts to a decree within the definition of the term contained in section 2 of the Civil Procedure Code. It is perfectly clear that the answer to the question must depend upon the determination of the point whether the adjudication in question satisfies the requirements of the definition of the word ‘decree.’ Now, the adjudications of a Court of Justice fall under two main heads, they may be either decrees or orders. To constitute a decree the decision must fulfil the following conditions :—

(i). It must have been arrived at in a *suit*.

(ii). It must have been expressed on the *rights* of the parties with regard to *all or any of the matters in controversy*.

(iii). It must be a *conclusive* determination of those rights, so far as the Court expressing the adjudication is concerned.

If in the case of a particular decision all these elements combine, then it is a decree, unless it is expressly excepted by the Code, *e. g.* an adjudication mentioned in the lists of appealable orders specified in section 104 and order 43. On the other hand, if any one of the three elements is absent, the decision cannot be viewed as a decree, and must be treated as a mere order.

These principles of law are clear enough, and do not admit of any dispute; but the real difficulty, sometimes, arises in applying them to concrete instances and in determining whether a particular decision does, or does not, amount to a decree. If it is enumerated in the aforesaid lists, then the matter is perfectly simple; but when the decision does not find a place therein, it is either a decree, or a non-appealable order.

Turning now to the matter of abatement, which is directly before us, we think there can be no manner of doubt that, if a person claiming to be the legal representative of the deceased plaintiff applies for an order to set aside the abatement, and the Court finds no sufficient cause, which prevented him from continuing the suit, and consequently it declines to accede to the request, the adjudication refusing to set aside the abatement is not a decree, because it is expressly mentioned in order 43, rule 1 (k) as an order from which an appeal is competent. But, suppose, no application under order 22, rule 9, for the revival of the suit is made, and the person dissatisfied with the abatement comes direct to the Appellate Court, the question arises whether the decision, from which he is appealing, is a decree or not. It seems to us that no hard and fast rule can be laid down, which would cover all cases of this kind. It is a matter for consideration in each case whether the particular decision conclusively determines the rights of the parties with regard to all or any of the matters in controversy between them. For instance, the sole plaintiff dies, and no application to bring his legal representative on the record is made within six months, the abatement of the suit follows *ipso facto*, and no order of the Court directing the abatement is necessary. And here we may point out the difference between the Code of 1908 and its predecessor. It will be observed that section 366 of the Civil Procedure Code of 1832 contained the important words "the Court may pass an order that the suit shall abate"; and these words gave rise to a diversity of judicial opinion. The High Courts of Bombay and Madras held that such an order was a decree, and was, therefore, appealable, *vide I. L. R. 10 Bom. 220 (1)* and *18 Mad. 496 (2)*. The Allahabad High Court, however, took the contrary view, and held that it was a non-appealable order, see *I. L. R. 17 All. 172 (3)* and *25 All. 206 (4)*. For these words, the Code of 1908 substitutes the phrase "the suit shall abate", and we may, therefore, draw the inference that the Legislature contemplated that an abatement in consequence of the omission to make, within the prescribed period, an application to implead the legal representative of the deceased plaintiff results from the operation of law, and that it is not necessary to make an order that the suit shall abate. It is observable that in spite of the change in the language, the conflict which existed under the old Code, has continued, and

(1) (1885) *I. L. R. 10 Bom. 220 (Bhikaji Ram Chandra v. Purushotam)*.

(2) (1895) *I. L. R. 18 Mad. 496 (Subbayya v. Saminadayyar)*.

(3) (1895) *I. L. R. 17 All. 172 (Hamida Bibi v. Ali Husen Khan)*.

(4) (1902) *I. L. R. 25 All. 206 (Mehdi Husain v. Sughra Begam)*.

that both the Madras and Allahabad High Courts have adhered to the divergent views previously held by them, *vide* 30 *Mad. L. J.* 486 (1) and 12 *All. L. J.* 1113 (2). After examining the matter carefully we consider that if a Court passes a purely formal order recognizing the abatement, which is a *fait accompli*, such an order, though virtually disposing of the suit, does not adjudicate upon any rights, and cannot be treated as a decree. An order of this nature, as observed already, merely records an abatement, which has already taken place by reason of the lapse of six months after the death of the plaintiff, and does not contain any decision arrived at by the Court. In a case of this kind order 22, rule 9, allows the legal representative to make an application for the revival of the suit, and the only question the Court is thereupon required to determine is whether the applicant was prevented by any sufficient cause from continuing his suit, and if the decision is in the negative, the aggrieved party is entitled to prefer an appeal against that order under order 43, rule 1 k). The decision of the Appellate Court is, however, made final, and a second appeal is not competent.

The language of order 22, rule 9 (2), when carefully examined, leads us to the conclusion that it is confined to cases in which the abatement takes place by reason of an application not having been made within the time permitted by law to implead the legal representative of the deceased plaintiff or the deceased defendant, and that it has no applicability to cases, in which the suit has abated on account of some other cause. This view receives support from the decision of the Madras High Court in 31 *I. C.* 4 (3). Suppose, the sole plaintiff in a suit dies, and in spite of an application within six months by his legal representative the Court holds that the right to sue does not survive and consequently directs the abatement of the suit. An abatement of this character obviously stands on a different footing. It does not take place *ipso facto*. The Court does not record a merely formal order reciting a past event, as in the case of an abatement in consequence of an application, not having been made within the prescribed period to implead the legal representative, but it exercises its mind in the determination of a matter in controversy. The decision of the Court directing the abatement of the suit is, in our opinion, a decree, because the right to represent the deceased is a point in controversy between the claimant and the opposite

(1) (1916) 30 *Mad. L. J.* 486 (*Suppu Nayakan v. Perumal Chetty*).

(2) (1914) 12 *All. L. J.* 1113 (*Walayat Husain v. Ram Lal*).

(3) (1914) 31 *Indian Cases* 4 (*Subramania Iyer v. Venkatararamier*).

party, and the adjudication determines their rights with respect thereto, and puts an end to the case, there being no appeal from the adjudication as an appeal from an order. An application under rule 9 is, as observed above, incompetent, and it is difficult to believe that the Legislature intended that the decision of a matter, which concludes the suit, should be final, and that the aggrieved party should have no remedy whatever.

These observations would apply *mutatis mutandis* to an abatement on account of the right to sue not surviving upon the death of the sole defendant. When there are two or more plaintiffs, and one of them dies, and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, and no application to bring the legal representative on the record is made within six months, order 22, rule 3, lays down that the suit shall abate so far as the deceased plaintiff is concerned. What is the effect of this partial abatement on the suit of the surviving plaintiff or plaintiffs? If the suit is of such a nature, that it cannot proceed in the absence of the deceased's legal representative the partial abatement will result in the total abatement or dismissal of the suit. Whether the final decision is called an abatement, or a dismissal, *qua* the surviving plaintiff or plaintiffs, it is manifest that it falls, within the definition of the term 'decree,' and is appealable as such.

We consider it unnecessary to multiply instances, suffice it to say, that when the order of the Court merely recognizes an abatement, which has already taken place on account of the death of a plaintiff not followed by an application within six months to implead his legal representative, and does not determine any matter in controversy between the parties, it cannot be regarded as a decree. If, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under order 22, rule 9, it amounts to a decree and is appealable as such.

With this answer to the question referred to us the case will now be remitted to the Division Bench for final disposal.

No. 129.

Before Hon. Mr. Justice Scott-Smith and Hon. Mr. Justice Broadway.

SEWA SINGH—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT BHOLI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 675 of 1914.

Government Tenants (Punjab) Act, III of 1893—Government grant of land—status of widow of Abadkar, who after death of her husband acquired proprietary rights in the holding.

In 1896 one U. S. was granted by Government Abadkar rights in certain lands comprised in square No 55-56 situate in Chak 64, Jhang Branch. U. S. died in 1898 leaving a widow and a daughter. In 1899 mutation was effected in favour of the widow and in 1903 she was granted occupancy rights. In 1912 she paid the necessary money and acquired full proprietary rights in these lands and then made over the property to her daughter.

Held, that the land was, under these circumstances, the self-acquired property of the widow and that the collaterals of her deceased husband had no *status* to challenge the alienation made by her in favour of her daughter.

8 P. R. 1915 (1) and Civil Appeals No. 1256 of 1906 and 869 of 1908 (unpublished), referred to.

Second appeal from the decree of A. H. Brasher, Esquire, Additional Divisional Judge, Shahpur Division, at Lyallpur, dated the 6th February 1914.

Morton, for Appellant.

B. Bevan Petman and Shankar Das, for Respondents.

The judgment of the Court was delivered by—

31st May 1916.

BROADWAY, J.—The facts of this case are simple. On or about the 28th August 1896 one Uttam Singh was granted by Government Abadkar rights in certain lands comprised in square No. 55-56, situate in Chak 64, Jhang Branch. This grant was apparently made under Act III of 1893. Before Uttam Singh had acquired any occupancy rights in this land he died (on the 2nd February 1898) leaving him surviving a widow, Mussammat Bholi, and a daughter Mussammat Nihal Kaur.

Mutation was effected in favour of Mussammat Bholi on the 29th June 1899, and she arranged for the cultivation of the land and on the 8th May 1903 was granted occupancy rights in the holding.

In 1912 she paid the necessary money to Government and acquired full proprietary rights in these lands. She then on 11th August 1912 made over the property to her daughter Mussammat Nihal Kaur.

On the 23rd October 1912 one Sewa Singh, alleging that he was the adopted son of Bhagwan Singh, a brother of Uttam Singh, filed this present suit asking for a declaration that this alienation by Mussammat Bholi in favour of Mussammat Nihal Kaur was invalid and ineffective as against him.

The learned Subordinate Judge held that the lands in suit were the self-acquired property of Mussammat Bholi, who was therefore entitled to make any disposition she wished with regard to them. He dismissed the plaintiff's suit on the 31st July 1913. An appeal against this order by Sewa Singh was dismissed on the 6th February 1914 by the learned Additional Divisional Judge.

Against this dismissal Sewa Singh has preferred this second appeal to this Court and we have heard Mr. Morton on his behalf, while Mr. B. Bevan Petman has addressed us on behalf of Mussammat Bholi. Mr. Morton has complained that a certain receipt which was tendered in evidence for the first time in the Lower Appellate Court was improperly rejected.

Order 41, rule 27, Civil Procedure Code, gives the Court discretionary powers and we see no reason for thinking that these powers were improperly exercised.

Then it was alleged that certain admissions made by Mussammat Bholi relating to her reasons for making this gift to her daughter have been omitted from consideration. We fail to see what hearing this has on the point at issue.

The real question in the case is whether Mussammat Bholi inherited this property from her husband or has herself acquired it, if the latter the gift by her cannot be challenged by Sewa Singh. Mr. Morton contends that as the land was originally granted to Uttam Singh Mussammat Bholi has derived her right in it through and from him. The mere fact that Uttam Singh was only a tenant-at-will, he urges is of no importance inasmuch as Mussammat Bholi would never have been allowed to hold the lands had she not been Uttam Singh's widow. Further it is contended that if Mussammat Bholi has bought the proprietary rights out of the savings from the land, those rights must still be held to have been obtained through her husband.

We were referred to 121 *P. R.* 1893 (1) in which it was held that property acquired by a widow *as representing* her deceased husband must be regarded as forming a part of the estate left by that husband. This however begs the question, as what we have to decide in this case is whether Mussammat Bholi acquired these lands in her own right or as representing her husband. It is quite clear that the grant to Uttam Singh gave him no rights of any kind in these lands. He was a mere tenant-at-will and only held that status at the time of his death. By allowing the lands to be mutated in Mussammat Bholi's name Government merely renewed the grant to her, and she in due course by complying with the necessary conditions, expending money and arranging for the proper management of the property successively acquired first occupancy and then proprietary rights in the lands in suit.

In these circumstances we consider that when Mussammat Bholi paid the necessary sum to Government she became the owner of the land in her own right.

Mussammat Malap Kaur v. Hakim Singh, (8 *P. R.* 1915) (1) relied on by Mr. Petman is in point and supports us in our view, as also do two unreported decisions of this Court, *viz.* Civil Appeals 1256 of 1906 and 869 of 1908.

In the former a similar grant was made to one Gurdit Singh who died without having acquired proprietary or other rights. He was succeeded by his son Wir Singh who paid the necessary sum to Government and was granted proprietary rights. Wir Singh then sold the land so acquired, and his son brought a suit to have this sale declared invalid as against him, on the grounds that the property was "ancestral" and the sale without necessity. It was held that the property was not ancestral in the hands of Wir Singh, as Gurdit Singh was never its owner but only a Government tenant, Wir Singh himself being the person who had acquired the proprietorship.

In Civil Appeal 869 of 1908 the circumstances were similar. One Risaldar-Major Hira Singh had been granted land on the terms of yeoman's grant. He died without having taken steps to convert his tenancy into a proprietary holding. On his death one-half of the lands were made over to his daughter who subsequently acquired the proprietorship by purchase in due course. It was held that the daughter had acquired the land in her own right.

(1) 8 *P. R.* 1915 (*Musst. Malap Kaur v. Hakim Singh*).

It is obvious then that Sewa Singh cannot challenge the gift made by Mussammat Bholi and we therefore dismiss this appeal with costs.

Appeal dismissed.

No. 130.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Chevis.*

NIAZ ALI—(DEFENDANT)—APPELLANT,

Versus

**MUHAMMAD RAMZAN AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.**

Civil Reference No. 13 of 1916.

Civil Procedure Code, Act V of 1908, section 113 and order 46, rule 1—reference to Chief Court in cases open to further appeal—Pre-emption—effect of notification by Local Government (withdrawing right of pre-emption to land such as that in suit) on appeal after a decree for pre-emption has been passed.

Held, that under section 113, read with order 46, rule 1, of the Code of Civil Procedure, reference to Chief Court should only be made in cases not open to further appeal.

Held also, that where a pre-emptor has obtained a decree for pre-emption and during pendency of an appeal by the other side all rights to pre-empt with regard to land like the land in suit cease to exist by reason of a notification issued by the Local Government, the decree should be upheld, unless fault can be found with it by the Appellate Court.

10 P. R. 1913 (1), distinguished.

65 P. R. 1913 (2), referred to.

*Case referred by H. A. Rose, Esquire, District Judge, Sialkot,
with his No. 100-J., dated 18th August 1916.*

Gobind Das, for Appellants.

Malik Muhammad Hussain, for Respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—The plaintiffs in this case sued to pre-empt, and obtained a decree on condition of payment of Rs. 1,000 by a certain date. The vendees appealed to the District Judge. While the appeal was pending in the District Court the Local Government issued a notification taking away rights of pre-emption with respect to agricultural land within the limits of a Municipality. The learned District Judge has now referred to this Court the question whether 10 P. R. 1913 (1) 3rd June 1916.

(1) 10 P. R. 1913 (*Bishen Singh v. Ganda Singh*).

(2) 65 P. R. 1913 (*Mussammat Sat Bharai v. Sat Bharai*).

covers the case of a pre-emptor, who has already obtained a decree but against whom the vendee-defendant has lodged an appeal prior to the issue of a Government notification taking away the right of preemption.

The order of reference quotes section 113 of the Civil Procedure Code, but that section should be read in conjunction with order 46, rule 1, which provides for reference to a High Court only in cases not open to further appeal. But as the question is a simple one, and as both sides have been represented in this Court, we think it better in the interests of all concerned that we should answer the question put to us.

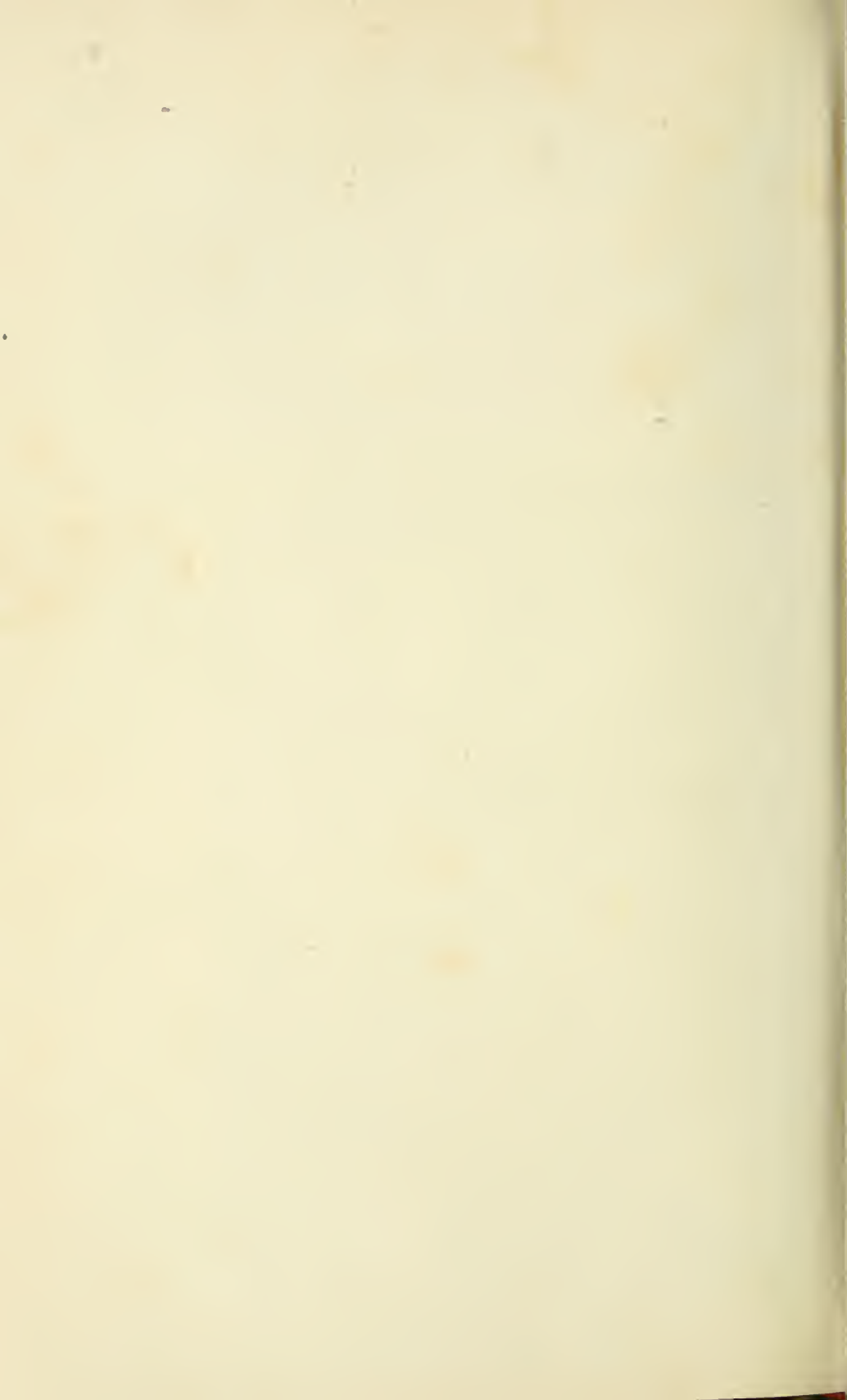
It is clear that all rights to pre-empt with regard to land like the land in suit ceased from the date of the notification. But before that date the plaintiff in the present case had already obtained a decree, and thereby he became more than a mere plaintiff seeking to enforce a claim to pre-empt. He became a decree-holder, entitled immediately he paid in the pre-emption money to the status of full owner, provided of course that the decree of the first Court was not upset on appeal. In the Appellate Court he is a decree-holder defending the decree which has already been passed in his favour, and unless fault can be found with that decree it should be upheld. If the decree was right on the day it was passed the subsequent Government notification cannot make it wrong, as the notification has no retrospective effect. It is clear then that the case differs from 10 P. R. 1913 (1) in which the notification was issued before the plaintiff had obtained any decree. In this connection, too, we may refer to 65 P. R. 1913 (2), a case in which a female reversioner sued for a declaration that an alienation should not affect her reversionary rights. Her suit being dismissed by the first Court, she appealed, still seeking a declaratory decree, but during the pendency of the appeal the alienor died and the appeal was then dismissed for the reason that, succession having opened out, the plaintiff had lost her right to obtain a mere declaration. So, too, in the present case, had the plaintiff's suit been dismissed by the first Court, and had the plaintiff been the appellant in the District Court, we take it that a Government notification, issued while the appeal was pending and taking away the right to pre-empt, would have been fatal to the plaintiff's chance of success. But, as we have already pointed out, the

(1) 10 P. R. 1913 (*Bishen Singh v. Ganda Singh*).

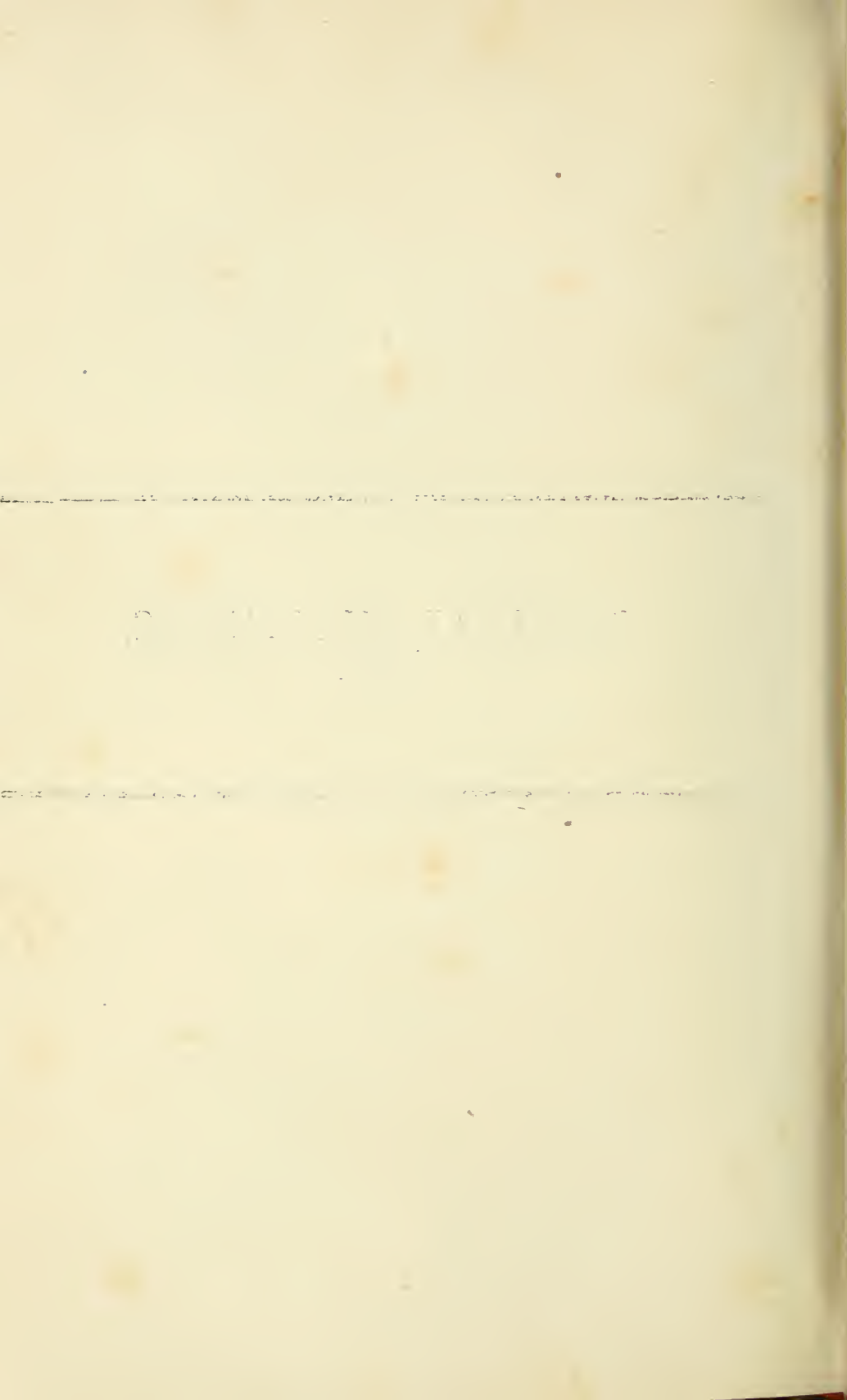
(2) 65 P. R. 1913 (*Musst. Sa. Bharai v. Sat Bharai*).

plaintiff is not now seeking to enforce a right to pre-empt, but he is a decree-holder defending his decree, and we hold that the notification is no bar to his defence.

The case is returned to the District Judge, who will dispose of the appeal on its merits. Pleaders' fees in this Court Rs. 16 each side, which will be costs in the cause (*vide* order 46, rule 4).



CRIMINAL JUDGMENTS,
1916.



Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Hon. Mr. Justice Shadi Lal.

CROWN

Versus

AHMAD BAKHSH—(DEFENDANT).

Criminal Revision No. 987 of 1915.

*Criminal Procedure Code, Act V of 1898, sections 110, 117 (2) and 256—
right to recall witnesses for prosecution for cross-examination in proceedings
under section 110.*

Held, that notwithstanding the provisions of section 117 (2) of the Code of Criminal Procedure, a defendant in proceedings under section 110 for security for good behaviour has not the right of recalling the witnesses for the prosecution for further cross-examination allowed in warrant-cases under section 256.

I. L. R. 35 Cal. 243 (1), followed.

*Case reported by S. Wilberforce, Esquire, Sessions Judge,
Ferozepore, with his No. 352 J. of June 1915.*

Saunders, for the Crown.

Nemo, for Defendant.

The proceedings are forwarded for revision on the following grounds :—

In this case under section 110 of the Code of Criminal Procedure applicant reserved his cross-examination of several witnesses for the prosecution, *e. g.*, witnesses 14, 15, 16, 17. After the evidence was concluded for the prosecution he applied for the recall of these and other witnesses for the prosecution for cross-examination. The Magistrate refused, by an order dated 3rd November 1914, on the ground that there is no procedure for recalling witnesses for further cross-examination. Four days later another order to the same effect was passed. From this order it appears that the order of 3rd November 1914 was a final one.

The order of the lower Court is obviously contrary to the provisions of section 256, Criminal Procedure Code, and should be set aside, and the Magistrate ordered to proceed according to law.

The order of the Chief Court was delivered by—

7th August 1915.

SHADI LAL, J.—The point for determination in this case is whether a person against whom proceedings under section 110, Criminal Procedure Code, are taken, is entitled to ask the Court to recall witnesses, who have given evidence against him, for further cross-examination. Now it is beyond dispute that section 256, Criminal Procedure Code, which gives the accused a right of double cross-examination is confined in its operation to warrant-cases and that it does not apply *proprio vigore* to security proceedings. Section 117 (2), which embodies the law relating to proceedings for conducting enquiries in security-cases, however, provides that such enquiry shall be conducted, *as nearly as may be practicable*, where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed. The question then arises whether the person proceeded against under section 110 can, in pursuance of the aforesaid provision of law, invoke the aid of section 256.

It will be observed that the rules of procedure for conducting trials and recording evidence in warrant-cases are made applicable to bad livelihood cases “as nearly as may be practicable.” Now the *rationale* of the principle which finds expression in section 256 is that an accused person in a warrant-case is not informed of the exact case he is required to meet until the charge has been framed, and it is therefore considered just and right that he should, after the framing of the charge, be allowed to further cross-examine the witnesses for the prosecution. In security-cases the order passed by the Magistrate under section 112 is equivalent to a charge in a warrant-case and the person against whom the order is made is fully aware of what is alleged against him. The evidence is thereafter recorded in his presence and he has every reasonable opportunity of cross-examining the witnesses. There is consequently no conceivable reason why he should be allowed the right of a second cross-examination and why he should thereby protract the proceedings unnecessarily. The reason which underlies the rule as to double cross-examination in warrant-cases is entirely absent here, and the principle of *cessante ratione cessat ipsa lex* is fully applicable.

For these reasons I am clearly of opinion that the petitioner is not entitled to ask the Court to recall witnesses for further cross-examination. This conclusion is accordant with the general principles referred to above, and the same

view has been taken by the Calcutta High Court in *I. L. R. 35 Cal. 243 (1)*. I cannot therefore accept the recommendation made by the learned Sessions Judge and dismiss this application for revision.

I find that the pleader for the respondent, thinking that he was entitled to cross-examination under section 256 did not cross-examine at all the witnesses Nos. 14, 15, 16 and 17 and the Court recorded that he had reserved his right of cross-examination. It appears that both the pleader and the Magistrate were under a misapprehension as to the applicability of the aforesaid section. In these circumstances the Magistrate should, in my opinion, reconsider the question of affording an opportunity to the respondent of cross-examining the four witnesses referred to above.

Revision rejected.

No. 2.

Before Hon. Mr. Justice Shadi Lal.

CROWN, THROUGH NADAR DIN—COMPLAINANT,

Versus

FAZAL ILAHI —(ACCUSED).

Criminal Revision No. 1047 of 1915.

Workmen's Liability Act, XIII of 1859—obtaining an advance on agreement to pay it off by delivering ballast.

Held, that an agreement by which the accused received an advance of money from the complainant and contracted to pay it off by delivering ballast did not constitute the relationship of labourer and employer of labour between the parties and the provisions of Act XIII of 1859 were, consequently, inapplicable to the case.

Case reported by Lieutenant-Colonel C. P. Egerton, Sessions Judge, Rawalpindi, with his No. 742, dated the 22nd June 1915.

Ralli, for Complainant.

Nemo, for Accused.

The accused, on conviction by E. J. Stephens, Esquire, exercising the powers of a Magistrate of the 1st class in the Rawalpindi District, was directed by order, dated 24th April 1915, under sections 2/3, Act XIII of 1859, to either work off the balance of Rs. 218-13-6 within four months or pay back that sum to complainant within that period and to enter into a bond of Rs. 300 with one surety for due performance of the order and failing that to undergo one month's rigorous imprisonment.

The proceedings are forwarded for revision on the following grounds :—

The applicant has been ordered by E. J. Stephens, Esquire, Extra Assistant Commissioner, exercising the powers of a Magistrate, 1st class, under sections 2/3 of Act XIII of 1859, to either work off the balance of Rs. 218-13-6, being the balance of the amount of ballast which he contracted to deliver to the plaintiff or to pay back that sum to the complainant within four months and to enter into a bond of Rs. 300 with one surety for due performance of the order or in default to undergo one month's rigorous imprisonment.

The record is submitted to the learned Judges of the Chief Court for revision on the following grounds :—

- (1) The applicant is not shown to be an "artificer, workman, or labourer" within the meaning of the Act.
- (2) The contract was apparently one to supply ballast and did not entail the personal labour or service of the applicant. (*P. R.* 28 of 1908) (1).
- (3) The case is therefore one for the Civil Courts, it being an ordinary breach of contract.

I consider therefore that the Magistrate's order should be set aside and the complainant left to pursue his remedy in the Civil Courts if so advised.

The Order of the Chief Court was delivered by—

28th August 1915.

SHADI LAL, J.—The accused received an advance of money from the complainant and contracted to pay it off by delivering ballast. There was no relationship of labourer and employer of labour between the parties and the provisions of Act XIII of 1859 are inapplicable to the case. The accused is not an artificer, workman or labourer within the purview of section 1 of the Act and the conviction is therefore illegal.

I accordingly accept the recommendation and acquit the accused. He shall be discharged from his bail.

Revision accepted.

No. 3.

Before Hon. Mr. Justice Shadi Lal.

THE CROWN

Versus

SAUDAGAR AND OTHERS—(ACCUSED).

Criminal Revision No. 1338 of 1915.

Cattle Trespass Act, I of 1871, sections 10, 24—seizure of cattle by occupier, obstructed by owners of the cattle who also claimed to be owners of the land.

Held, that the occupier of land has, under the Cattle Trespass Act, 1871, section 10, the right to seize trespassing cattle, and the owners of the cattle who forcibly opposed the seizure were guilty of an offence under section 24 of the Act, notwithstanding that they claimed to be owners of the land in question.

23 W. R. (Cr.) 2 (1), referred to.

Case reported by Q. Q. Henriques, Esquire, District Magistrate, Kangra.

Lakhshmi Narain, for Crown.

N. C. Mehra, for Accused.

The facts of this case are as follows:—

Sandhcor Singh, Jamadar of the Raja of Lambagraon, presented a complaint against 11 persons of Tika Gharun. He alleged that cattle had trespassed on a plot of ground belonging to the Raja, and preserved by him for grass and trees.

He further alleged that when Churandu, Guard, was driving them off to the pound, the accused collected and prevented their removal.

The accused, on conviction by Lala Arjan Das, exercising the powers of a Magistrate of the 1st class in the Kangra District, were directed, by order dated 29th May 1915, under section 24 of Act I of 1871, to pay a fine of Rs. 20.

The proceedings are forwarded for revision on the following grounds:—

It is not proved that the cattle were liable to seizure.

The right of accused to graze on the land in dispute has always been asserted and the matter has not been finally decided.

In the Settlements of 1891-92 and of 1911-12 the land is recorded as "*shamilat, magbuza malikan hasb hissas malguzari.*" In 1914, the villagers applied, under section 150 of the Land Revenue Act, to have an encroachment made by the Raja removed. This was rejected.

At present therefore the entries in the Revenue Records are in favour of the accused; those entries have been repeated in the present Settlement. On the other hand, the Revenue Officer refused to remove the encroachment made by the Raja.

The view, I hold, is that the question of the right of accused to graze is still undecided and is open to reasonable doubt; and therefore this criminal conviction should be set aside.

The Order of the Chief Court was delivered by—

25th Sept. 1915.

SHADI LAL, J.—It is absolutely clear that the accused opposed the seizure of cattle in the manner alleged by the prosecution and the question is whether the cattle were liable to be seized under the Cattle Trespass Act. Now the Magistrate has found, after full consideration of the evidence on the record, that the Raja of Lambagraon was in exclusive possession of the land upon which the trespass was committed and upon that finding it is manifest that he was the occupier of the land within the purview of section 10 of the aforesaid Act and as such was entitled to seize, or cause to be seized, any cattle trespassing on the land in his possession. The question of title upon which the recommendation of the learned District Magistrate is based, does not affect the right of the occupier to seize the cattle trespassing on the land in his possession (*vide, inter alia*, 23 Weekly Reporter, 2, Criminal (1)).

For the aforesaid reasons, I am of opinion that the order of the Magistrate is fully justified and that the recommendation made by the learned District Magistrate, which proceeds upon a wrong view of law, cannot be accepted.

Revision rejected.

No. 4.

Before Hon. Mr. Justice Shadi Lal.

FATEH SHER KHAN AND OTHERS—PETITIONERS,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 1068 of 1915.

Criminal Procedure Code, Act V of 1898, section 145 (4)—necessity of taking evidence.

Held, that before passing an order for possession in proceedings under section 145 of the Code of Criminal Procedure the Magistrate should receive the evidence produced by the parties (*vide* clause 4 of the section) and that this requirement was not satisfied by the examination of a person who was not the witness of either of the parties.

8 Cal. W. N. 719 (1), referred to.

Petition for revision of the order of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zuila, Sessions Judge, Mianwali, dated the 12th April 1915.

Kirkpatrick and Nanak Chand, for Petitioners.

Mukand Lal and Tek Chand, for Respondent.

The judgment of the learned Judge was as follows:—

SHADI LAL, J.—This is an application for the revision of 10th Nov. 1915.
an order passed under section 145, Criminal Procedure Code. The dispute relates to a large and valuable holding, about 8,914 *bighas* in area, which originally belonged to one Alam Khan, who died in 1892 leaving a widow Mussammat Bakht Bibi. Both the petitioners and the respondents are his reversioners and the respondents are also his daughter's sons. The latter on the death of Alam Khan, claimed the inheritance on the strength of a will alleged to have been executed by the deceased but its genuineness was contested by the petitioners. The Settlement Officer declined to act upon this will and sanctioned the mutation in favour of the widow and left the respondents to establish their title, if so advised, in a Civil Court. No Civil suit was brought and on the death of Mussammat Bakht Bibi on the 30th of May 1914 the same claim was again put forward and was again rejected by the Settlement Officer who directed the mutation to be effected in favour of both the parties as the reversioners of Alam Khan.

In consequence of the above order the respondents instituted on the 25th of August 1914 a suit to establish their exclusive right of succession, but withdrew it on the 5th July 1915 after the order under revision had been passed.

(1) (1904) 8 Cal. W. N. 719 (*Jogendra Nath Rai v. Abu Shaikh*),

Now the proceedings under section 145 began on the report of a police officer upon the strength of which the learned Magistrate made the usual preliminary order on the 23rd September 1914. The parties appeared before him on the 12th of October, and it appears that on that day the Magistrate after recording the statements of the representatives of each party examined one Sher Muhammad, a lambardar of the village, and then passed the final order against the petitioners.

It is beyond dispute that Sher Muhammad was a witness of neither party and was called by the Magistrate *suo motu*. It is contended before me that the petitioners were not given an opportunity to produce their evidence with respect to the question of actual possession and that they have therefore been materially prejudiced. The record certainly does not show that they were ever questioned as to whether they wanted to adduce their proof; and considering that the property in question is very valuable, that the order of mutation is in favour of both the parties jointly, and that the tenants who cultivated the land in the life-time of the widow appear to be still in physical possession of the entire estate, I am of opinion that the enquiry made by the lower Court was of a very summary character. The law contained in section 145 (4) requires an examination of the witnesses of the parties and this requirement is not satisfied by the examination of a person who is not a witness of either of them.

I do not wish to pronounce any opinion on the merits of the question involved in the case. The conclusion of the Magistrate may be correct, but there is little doubt that in view of the peculiar circumstances partly referred to above the matter requires careful consideration. The case is, to some extent, similar to that reported in 8 *Calcutta Weekly Notes*, 719 (1), where a Division Bench of the Calcutta High Court held that an order of possession under section 145 passed on the evidence of a person, who was not called by either party, was bad in law. Accordingly I set aside the order dated the 12th October 1914 and direct the Magistrate to make an enquiry in accordance with section 145 (4) and determine the question of possession *de novo*. I need not add that my judgment does not involve the quashing of the preliminary order passed under section 145 (1) which shall continue in force pending the final decision by the lower Court.

Revision accepted.

No. 5.

Before Hon. Mr. Justice Rattigan.

AHMAD KHAN—(CONVICT)—APPELLANT,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 983 of 1915.

Criminal Procedure Code, Act V of 1898, section 408 (b)—appeal by person sentenced by Magistrate with enhanced powers to two years' imprisonment in a case in which another accused was sentenced to a term exceeding four years.

The appellant was sentenced by a Magistrate of the 1st class exercising enhanced powers under section 30 of the Code of Criminal Procedure to two years' rigorous imprisonment and fine of Rs. 200 in a case in which another accused was sentenced to five years' rigorous imprisonment and a fine of Rs. 200. The latter did not appeal. In the appellant's appeal the Sessions Judge declined jurisdiction.

Held, that under section 408 (b) of the Code of Criminal Procedure the appeal lay to the Chief Court.

17 *Mad. L. J. R.* 248 (1), referred to.

Appeal from the order of T. B. Deeks, Esquire, Magistrate, 1st class, Gujranwala, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 15th day of September 1915.

Raghunath Rai, for Appellant.

Nemo, for Respondent.

The Judgment of the learned Judge was as follows :—

RATTIGAN, J.—The appellant Ahmad Khan and one Ahman 20th Nov. 1915. have been convicted by a Magistrate of the 1st class, exercising enhanced powers under section 30 of the Criminal Procedure Code, of an offence under section 420, Indian Penal Code, and have been sentenced, Ahmad Khan to two years' rigorous imprisonment and a fine of Rs. 200, and Ahman (who has two previous convictions under sections 379 and 457, Indian Penal Code, respectively, as well as a very recent conviction under section 420, Indian Penal Code standing against him) to five years' rigorous imprisonment and a fine of Rs. 200 and to police surveillance for a period of two years. Ahman has not appealed, but Ahmad Khan has preferred this appeal (which was originally presented to the Sessions Judge who declined jurisdiction upon the strength of the ruling of the Madras High Court reported in 17 *M. L. J. Reports* 248) (1), through his counsel, Mr. Raghunath Rai.

(1) (1907) 17 *Mad. L. J. R.* 248 (*Palani Koravan v. Emperor*).

I have heard the latter gentleman at length in support of the appeal and have also carefully considered the evidence on the record, but I can find no ground for differing from the conclusions arrived at by the Magistrate.

* * * * *

[The remainder of the judgment is not required for the purposes of this report.]

Appeal rejected.

No. 6.

Before Hon. Mr. Justice Shadi Lal.

KARMUN—(CONVICT)—APPELLANT,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 529 of 1915.

Indian Penal Code, 1860, section 399—making preparations for committing a dacoity—whether necessary to shew the part taken by each member of the gang.

Held, that although the mere assemblage to commit dacoity does not amount to “preparation” within the meaning of section 399 of the Penal Code, the Court was justified in holding in this case from the facts found, *viz.*, that the members of the gang had taken into their possession instruments for house-breaking and arms for the purpose of offence and defence and had actually proceeded to a place near the scene of contemplated dacoity, that the members of the assembly had got ready for the actual commission of dacoity, and they were consequently guilty of the offence specified in the section.

Also that it was not necessary that the prosecution should point out the exact part taken by each member of the gang as regards preparation, provided that it is shown that the accused were members of a gang which had made in fact preparation for dacoity.

I. L. R. 41 Cal. 350 (357) (1), referred to.

*Appeal from the order of F. H. Burton, Esquire, District
Magistrate, Karnal, dated the 28th May 1915.*

Gokal Chand, for Appellant.

Jaigopal Sethi, for Respondent.

The Judgment of the learned Judge was as follows :—

14th Dec. 1915.

SHADI LAL, J.— * * * * *

The result is that the assemblage of twenty-eight convicts has been fully established and the question arises whether they met together for the purpose of committing dacoity. In connection with this matter we have

(1) (1913) *I. L. R. 41 Cal. 350 (357)* (*Ramesh Chandra Banerjee v. Emperor*).

the following facts :—Seven convicts had firearms, ammunitions and house-breaking implements concealed in their beddings; three are previous convicts; and a few more have, during the pendency of the appeals, been convicted of the dacoity at Ranjit Singh's house. Ten of them had, in their possession, clothes and jewellery; and no fewer than twenty-five are residents of different villages in three districts beyond the Jmna. There is no apparent reason why all these persons should have met together in the garden in question, and if the purpose had been an innocent one they would have easily disclosed it. Having regard to all these circumstances I entertain no doubt whatsoever that the object of this assembly was to commit dacoity and that each and all of them are, therefore, guilty under section 402, Indian Penal Code.

The next point for consideration is whether the members of the assembly had made "preparation" within the purview of section 399, Indian Penal Code. Now, in order to commit the offence of preparation, it is not necessary that the prisoners should have done an overt act towards the commission of dacoity. What the law contemplates is that they should have done some act to get ready for a dacoity and the collection of men from different villages, coupled with the collection of arms, sufficiently proves the required preparation. The mere assemblage to commit dacoity does not amount to preparation, but when we find, as in this case, that the members of the gang had taken into their possession instruments for house-breaking and arms for the purposes of offence and defence, and they had actually proceeded to a place near the scene of contemplated dacoity, we are justified in holding that there was not only a mere assemblage, but that the members of the assembly had got ready for the actual commission of dacoity. It is not necessary that the prosecution should point out the exact part taken by each member of the gang as regards preparation, provided that it is shown that the accused were members of a gang which had made in fact preparation for dacoity (*vide I. L. R. 41 Cal. 350 at page 357*) (1).

Upon the evidence and the law set forth above I hold that all the accused are guilty under sections 399 and 402, Indian Penal Code, and that convictions and sentences are justified. I accordingly uphold the order of the District Magistrate and dismiss the appeal.

Appeal dismissed.

(1) (1913) I. L. R. 41 Cal. 350 (357) (*Ramesh Chandra Banerjee v. Emperor*).

No. 7.

Before Hon. Mr. Justice Leslie Jones.

RAM SINGH—(CONVICT)—APPELLANT,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 810 of 1915.

Indian Evidence Act, I of 1872, section 27—where two persons are alleged to have given information which led to the discovery of certain facts—necessity of proving the information given by each specifically—the first information only admissible.

Where in a criminal case it is alleged that two of the prisoners gave certain information to the police which led immediately to the arrest of one of the other accused.

Held, that it is only the information first given which can be admitted under section 27 of the Evidence Act and that it is necessary where two prisoners are said to have given information that what each prisoner said should be precisely and separately stated.

92 P. L. R. 1902 (1) and I. L. R. 6 All. 509 (533) per Straight, J. (2) reproduced at page 170 in Ameer Ali and Woodroffe's *Law of Evidence* (14th edition), referred to.

Appeal from the order of E. T. Bhan, Esquire, Magistrate, 1st class, exercising enhanced powers under section 30 of the Criminal Procedure Code, Gurdaspur, dated the 9th July 1915.

Nemo, for Appellant.

Sewa Ram Singh, for Respondent.

The Judgment of the learned Judge was as follows:—

21st Dec. 1915.

LESLIE JONES, J.— * * * * *

I have purposely left the appeal of Ali Bakhsh and Mehr Din to the last. The Magistrate has relied on certain evidence that they had knowledge regarding the movements of the dacoits on the night of the dacoity. This evidence, however, is not of a kind to bear examination and as regards one part of it at least the Magistrate is plainly inaccurate. He says that before the police got any communication with Mula Singh, Ali Bakhsh and Mehr Din were able to point out a *phulai* tree from which sticks had been cut for the use of three other dacoits but the police diaries make it clear that no such information was obtained until after Mula Singh's arrest. The Public Prosecutor has in fact discarded all the evidence against Ali Bakhsh and Mehr Din with the exception of the statement of the approver, and a further statement by a Sub-Inspector that they gave information which led immediately to the arrest of Mula Singh.

(1) 92 P. L. R. 1902 (*Alah Bakhsh v. Emperor*).

(2) (1884) I. L. R. 6 All. 509 (533) (*Queen-Empress v. Babu Lal*).

This is a case which was conducted in the first Court by a Public Prosecutor, yet not only the Police Officer and the Magistrate but also the Public Prosecutor have fallen into a very common mistake which often proves fatal to the cause of the prosecution. I can hardly believe that the Police Officer, the Magistrate and the Public Prosecutor all supposed that Ali Bakhsh and Mehr Din have but one brain and one tongue between them, and if they have not, it is not possible that both should have simultaneously given information which led to Mula Singh's arrest.

There is a passage in 6 *All.* 509 at page 533 (1) which is reproduced at page 170 of the Commentary of Ameer Ali and Woodroffe on *The Law of Evidence* (fourth edition). It doubtless re-appears in later editions. In that judgment Straight, J. observed as follows :—

“ I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state ‘ they said this ’ or ‘ they said that,’ or the ‘ prisoners then said.’ It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused in consequence of which he discovered a certain fact, or certain facts, the strictest precision should be enjoined on the witness so that there may be no room for mistake or misunderstanding. In detailing statements of this kind which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the witness was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it.”

Similar observations were made by Reid, J., in 92 *P. L. R.* 1902 (2) and it is I think a pity that his remarks have not found their way into the *Punjab Record* because a mistake of the kind with which I am now dealing is one which constantly recurs.

Two men cannot make a statement leading to a discovery. Both no doubt may give information to the police but it is only the information first given which can be admitted under section 27 of the Evidence Act. It is plain in this case that the

(1) (1884) *I. L. R.* 6 *All.* 509 (533) (*Queen-Empress v. Babu Lal*).

(2) 92 *P. L. R.* 1902 (*Alah Bakhsh v. Emperor*).

admission-statement was made either by Ali Bakhsh or by Mehr Din, but on the record it is impossible to say which. It was of course extremely necessary that the Police Officer, Sub-Inspector Gurbakhsh Rai (P. W. 28) should be particularly examined on this point and should have been asked to state if possible from which of these two appellants the first information came, and as this was not done Sub-Inspector Gurbakhsh Rai will now be called under section 428, Criminal Procedure Code, for further examination in this Court.

Appeal accepted.

No. 8.

Before Hon. Mr. Justice Rattigan.

THE CROWN

Versus

DHARMA SHAH—ACCUSED.

Criminal Revision No. 1570 of 1915.

Punjab Municipal Act, III of 1911, section 228, explanation—whether authority to prosecute given to persons by office, other than those mentioned in the explanation, is valid.

Held, that authority given by a Municipal Committee to the *Darogha Safai* (by office and not by name) to prosecute an offender under the Punjab Municipal Act is invalid—*vide* section 228, explanation and the conviction obtained in such prosecution is consequently without jurisdiction and bad for want of a proper complaint.

Case reported by Lieutenant-Colonel C. P. Egerton, Sessions Judge of Rawalpindi with his No. 1179 of the 17th September 1915.

Nemo, for Crown.

Accused, In person.

The Order of the Chief Court was delivered by—

14th Jan. 1916

RATTIGAN, J.—The Municipal Committee of Rawalpindi directed a notice to be issued to Dharma Shah requiring him to do certain things specified in the notice, and recorded an order to the effect that if the notice was not duly complied with, proceedings under section 219 of the Punjab Municipal Act should be instituted against the said Dharma Shah “by the *Darogha Safai*.” It is alleged that Dharma Shah did not comply with the notice and accordingly Lala Bhagwan Das, Conservancy *Darogha*, filed a complaint in the Court of Lala Ram Chand, Honorary Magistrate, first class, praying that Dharma Shah might be punished under section 219 of the said Act. The Magistrate has convicted Dharma Shah and sentenced

him to pay a fine of Rs. 10 and a further fine of Re. 1 per *diem* for such time as he fails to comply with the orders of the Committee.

The Sessions Judge of Rawalpindi has referred the case to this Court for revision on the ground (a) that the authority to prosecute given by the Municipal Committee did not comply with the provisions of section 228 of the Act, and (b) that the order which imposed the continuing fine was illegal, (13 P. R. of 1903 (1)).

Section 228 of the Act enacts that "unless otherwise expressly provided no Court shall take cognizance of any offence punishable under this Act or any rule or any bye-law thereunder except on the complaint of, or upon information received from, the Committee or some person authorised by the Committee in this behalf." An 'explanation' is added to the effect that the Committee may authorise persons to make complaints or give information, and that the person authorised may be authorised by office, if he is President, Vice-President, or Secretary of the Committee, or Officer in charge of a police station. In other cases, the authority must be personal. In the present case the authority to make the complaint was conferred upon the *Darogha Safai*, whereas it should have been conferred upon *Lala Bhagwan Das* who happened to fill that office. The provisions of section 228 are imperative and as the complaint was not made by a person duly authorised in accordance with the terms of that section I must hold that all the proceedings of the Magistrate were without jurisdiction and bad for want of a proper complaint. The conviction and sentence must, therefore, be set aside and the fine if levied be refunded.

I need hardly add that my present order will not stand in the way of a prosecution properly instituted by the Municipal Committee or by some person duly authorised by the Committee in this behalf upon the same facts.

Revision accepted.

No. 9.

Before Hon. Mr. Justice Shadi Lal.

ABDUL AZIZ—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 1226 of 1915.

Punjab Municipal Act, III of 1911, sections 114 and 219—notice by Committee to repair building in dangerous state—particulars necessary—insufficient notice vitiates criminal proceedings.

Petitioner was convicted under section 219 of the Punjab Municipal Act for disobedience of a written notice under section 114. The notice, after mentioning the building called upon the petitioner to remove it or to execute "sufficient" repairs to such portion of the building as was in a ruinous or dangerous condition.

Held, that the notice under section 114 was bad inasmuch as it did not specify the portion of the building which, in the opinion of the Committee, was in a dangerous condition nor the nature of repairs required to be made, and that this defect vitiated the conviction under section 219.

5 P. L. R. 1914 (Cr.) (1) and 3 P. R. (Cr.) 1912 (2), referred to.

Revision from the order of V. Connolly, Esquire, Additional District Magistrate, Delhi, dated the 15th June 1915.

Moti Sagar, for Petitioner.

Assistant Legal Remembrancer, for Respondent.

The judgment of the learned Judge was as follows :—

21st January 1916.

SHADI HAL, J.—The petitioner has been convicted, under section 219 of the Punjab Municipal Act, III of 1911, for disobedience of a written notice issued to him under section 114, and has been sentenced to a fine of Rs. 50. Now, the legality of the conviction depends upon the determination of the question whether the notice complied with the requirements of law. Section 114 authorizes the Municipal Committee to require the owner of a building in a dangerous state either to remove the same, or to cause such repairs to be made to it as the Committee may consider necessary for the public safety. The notice after mentioning the building calls upon the petitioner to remove it or execute "sufficient" repairs to such portion of the building as is in a ruinous or dangerous condition. Now two objections are taken to the validity of this notice. In the first place, it is urged that it does not specify the portion of the building, which, in the opinion of the Committee, is in a dangerous condition, and secondly, that the nature of the repairs required to be made has not been mentioned therein.

In my opinion, these objections are valid. The judgment of the learned Chief Judge in Criminal Revision No. 1232 of 1913 reported as 5 P. L. R. 1914 (1) is, *inter alia*, an authority for the view that the portion of the building, which in the opinion of the Municipal Committee is dangerous, should be specified. In regard to the second point, the ruling in 3 P. R. 1912 (Criminal) (2) is on all fours with the present case. It is true that that judgment deals with a prosecution under the

(1) 5 P. L. R. 1914 (Cr.) (*Pirithi Singh v. Crown*).

(2) 3 P. R. (Cr.) 1912 (*Crown v. Qadir Bakhsh*).

Cantonment Code, but section 94 of the Code is *in pari materia* with section 114 of the Municipal Act. Both the Acts use the words "such repairs" as the Committee may consider "necessary" and it will be observed that the notice in that case, which directed the owner to repair or demolish the house, was held to be bad.

In fact, the learned counsel for the Crown frankly admits that the notice in question does not comply with the terms of the section, but he contends that as the Magistrate has convicted the petitioner, this Court should refuse to interfere on revision. This contention I am unable to accept. It is clear that the notice is the foundation of the conviction, and when the notice is bad in law, the conviction must fail.

Accordingly I accept the application for revision, and set aside the conviction and sentence. The fine, if paid, shall be refunded to the petitioner.

Revision accepted.

No. 10.

Before Hon. Mr. Justice Leslie Jones.

SHER SINGH—(CONVICT)—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 138 of 1916.

Foreigners Ordinance, III of 1914, sections 3, 4 and 7—procedure for trial of an offender—right of appeal.

Held, that an Ordinance is a law and the infringement of its provisions is an offence and that therefore the inquiry into such an offence must be dealt with according to the provisions of the Criminal Procedure Code, in the absence of any other enactment prescribing a different method of inquiry, and, if the offence is one under Ordinance III of 1914, in the absence of any rule to the contrary made under section 7 of that Ordinance.

Held, consequently, that a person convicted and sentenced by a District Magistrate for an offence against section 3 of Ordinance III of 1914 has a right of appeal to the Court of Session—*vide* section 408 of the Code of Criminal Procedure.

Revision from the order of H. A. Rose, Esquire, Sessions Judge, Sialkot, dated the 30th August 1915.

Nemo, for Petitioner.

Assistant Legal Remembrancer, for Respondent.

The Judgment of the learned Judge was as follows:—

LESLIE JONES, J.—It was reported to the District Magistrate 22nd Jan. 1916. of Sialkot that the petitioner Sher Singh had infringed an order under section 3 of Ordinance No. III of 1914. The

District Magistrate first heard all the evidence without allowing Sher Singh to be represented by counsel and without framing any charge. Before however signing his order he decided that as no procedure was laid down for such cases it was wiser to hear the case as a warrant case under the Code of Criminal Procedure. He therefore re-heard all the evidence in the presence of counsel for the accused and framed a charge. As the result of these proceedings Sher Singh was ordered to undergo rigorous imprisonment for the term of one year.

Sher Singh then appealed to the Sessions Judge of Sialkot who held that he had no jurisdiction to hear the appeal. Sher Singh has now preferred a petition for revision to this Court. Mr Herbert, who has appeared for the Crown, has argued that if the District Magistrate had not employed the provisions of the Criminal Procedure Code, the Sessions Judge would have been perfectly right, but he has stated further that in his opinion the fact that the District Magistrate held a regular trial under the Criminal Procedure Code gave the petitioner a right to appeal to the Sessions Judge under section 408 of that Code and that for that reason he is unable to support the order of the Sessions Judge.

It seems to me, however, that if no trial was necessary and the District Magistrate was not bound to observe the provisions of the Code, the mere fact that he did so would be unessential. If he could punish the petitioner without a trial the mere holding of an unnecessary trial would not give a right of appeal.

I prefer therefore to base my decision on different grounds.

The contention of the petitioner is that the act of which he was accused, if committed, amounted to an offence as defined in section 4 (o) of the Criminal Procedure Code where an offence is described as meaning any act or omission made punishable by any law for the time being in force.

He then goes on to refer to section 5 (2) of the same Code in which it is laid down that "all offences under any other law (i.e. under the Indian Penal Code) shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

Section 7 (1) of Ordinance III of 1914 gives power to the Governor-General in Council to make rules for the purpose of carrying into effect the provisions of that Ordinance, but apparently no such rules have yet been promulgated.

It is true, as is remarked by the learned Sessions Judge, that the Ordinance in question is not an Act of the regular Legislature but it is nevertheless a law enacted by authority with power to enact it and is none the less a law because in order to distinguish it from Acts of the Legislature it is described as an Ordinance.

It is true, again, that the word "offence" is not used in section 4 of the Ordinance, but I do not know how it is possible to describe in one word the contravention of the provisions of any order made under section 3 otherwise than by the use of the word "offence," and it is noticeable, as has been pointed out to me by the learned Assistant Legal Remembrancer, that the word "offence" has been used in section 4 of Ordinance No VII of 1914 which amends section 4 of Ordinance III of 1914.

If, then, as I must hold, the Ordinance is a law and the infringement of its provisions is an offence, it follows that the inquiry into such an offence must be dealt with according to the provisions of the Criminal Procedure Code unless there is any other enactment in force prescribing a different method of inquiry into such an offence. It is possible that if any rules had been promulgated in exercise of the power conferred by section 7 of Ordinance III of 1914, a different procedure might have been laid down; but since there are no such rules it appears to me to be clear that the Criminal Procedure Code must be followed. It is impossible, I think, to suppose that in the application of this Ordinance it was intended to dispense with all forms of trial, any more than it is possible to suppose that the failure of the Ordinance to define the authority which is empowered to pass orders under section 3 or 4 would justify the exercise of such authority by any irresponsible person who elected to arrogate it to himself. The Courts empowered to try such offences are named in Schedule II of the Criminal Procedure Code, under the heading of offences against other laws.

For these reasons I hold that the District Magistrate was bound, as he did, to conduct the trial in accordance with the provisions of the Criminal Procedure Code, and that accordingly an appeal lay to the Sessions Judge under section 408 of that Code. I accordingly accept the petition for revision and remand the appeal to the Court of the Sessions Judge for decision on its merits.

Revision accepted.

No. 11.

Before Hon. Mr. Justice Rattigan.

THE CROWN

Versus

SALIMI AND OTHERS—ACCUSED.

Criminal Revision No. 1557 of 1915.

*Criminal Procedure Code, Act V of 1898, section 562--whether restricted to juvenile offenders.**Held*, that section 562 of the Code of Criminal Procedure is not restricted to juvenile offenders only.*2 Bom. L. R. 817 (1) and 2 L. B. R. 314 referred to.**Case reported by R. T. Clarke, Esquire, District Magistrate, Gujrat, with his No 1794, dated the 29th of September 1915.**Nemo*, for the Crown.*Nemo*, for Accused

The facts of this case are as follows :—

138 maunds of wood valued between Rs. 12 and Rs. 50 was stolen and sold by the accused to Fateh Muhammad, Contractor. The charge of the theft was proved against all of the accused and they were bound over under section 562, Criminal Procedure Code by the Tahsildar of Phalia.

The accused on conviction by M. Hamid Ali, Tahsildar, Phalia, exercising the powers of a Magistrate of the 2nd class in the Gujrat District, were directed, by order dated 24th of June 1915 under section 379 of the Indian Penal Code, to execute a bond in Rs. 200 each for six months under section 562, Criminal Procedure Code.

The proceedings are forwarded for revision on the following grounds :—

Salimi, Kamun, Mehra and Sahbu " Sohlas " of Bhalowal have been convicted by M. Hamid Ali, Magistrate, 2nd class, under section 379 of the theft of a quantity of wood, about 138 maunds, valued between Rs. 12 and Rs. 50, and have been bound over under section 562 instead of receiving sentence.

The order is improper for the following reasons. :—

(a) With the exception of Sahbu, whose age is 16 years, none of the accused are under the age of 30.

(b) The character and antecedents of the offenders are not good.

Salimi accused has long been under police supervision

and has been bound over under section 110, Criminal Procedure Code. They are "Sohlas," a caste addicted to crime and it has been necessary owing to the criminality of the village Bhalowal to impose a police post there.

(c) The offence is by no means trivial and there are no extenuating circumstances.

(d) The direction of the Chief Court contained in their endorsement No. 2039-G., dated 4th May 1910, has been ignored.

As I am uncertain whether as District Magistrate I can call up the accused for sentence I forward the case for orders of the Chief Court.

The order of the Chief Court was delivered by—

RATTIGAN, J.--I do not feel called upon to interfere at this stage. The Magistrate in taking action under section 562, Criminal Procedure Code, refers to the facts that the accused persons had been about 2 months in the lock-up and that there was no previous conviction standing against any of them. The case was a petty one and section 562 is not restricted to juvenile offenders only (2 *Bom. L. R.* 817 (1), 2 *L. B. R.* 314). I accordingly decline to interfere. 20th Nov. 1915.

No. 12.

*Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
Scott-Smith.*

KAIMI AND OTHERS—(CONVICTS)—APPELLANTS,

versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 1192 of 1915.

Criminal trial—evidence—duty of prosecution to produce before Magistrate all persons said to have witnessed the offence.

Held, that all persons said to have witnessed the offence tried should be produced before the Magistrate, though it is not necessary for a Public Prosecutor to tender in the Sessions Court any witness whom he may have reason to believe will give false evidence.

19 *Cal. W. N.* 28 (2), referred to.

(1) (1900) 2 *Bom. L. R.* 817 (*Queen-Empress v. Tukaram Chima*).

(2) (1914) 19 *Cal. W. N.* 28 (*Ram Ranjan Ray v. King-Empress*).

*Appeal from the order of A. H. Brasher, Esquire, Sessions Judge,
Lyallpur, dated the 25th of November 1915.*

Kirkpatrick and Meakins, for Appellants.

Ganpat Rai and Dalip Singh, for Respondent.

The Judgment of the Court was delivered by—

22nd Jan. 1916.

CHEVIS, J.— * * * * *

The principal witnesses in the case are Ahmad Din, Dulla and Sikandar. The fourth person said to have witnessed the murder, Muridi, was not produced as a witness either in the Sessions Court or before the committing Magistrate. The only reason given for his non-production is that found in the evidence of Muhamad Bakhsh, deceased's brother, *viz.*, that Muridi is under the influence of certain persons who are related to or friends of the appellants. Counsel for Appellants comments severely on the non-production of this witness, and quotes 19 C. W. N. 28 (1). We certainly think that all persons said to have witnessed the murder should have been produced before the Magistrate, though it is not necessary for a Public Prosecutor to tender in the Sessions Court any witness whom he may have reason to believe will give false evidence. After this lapse of time we think it would be useless to have Muridi called and examined, and we proceed to dispose of the appeal on the record as it stands. We think however that the natural presumption is that Muridi, if he were called, would not support the case for the prosecution.

[The remainder of the judgment is not required for the purposes of this report].

No. 13.

Before Hon. Mr. Justice Scott-Smith.

MUSSAMMAT MEHRAN AND BADRU—(CONVICTS)—
APPELLANTS,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 798 of 1915.

Indian Penal Code, 1860, section 366—conviction of young girl, 13 or 14 years of age—presumption of knowledge of consequences.

Held, that for an offence under section 366 of the Penal Code a special intent or knowledge is necessary, and that it could not be presumed that a young girl, 13 or 14 years of age, had the specific intent or knowledge, and if she did help to deceive the abducted girl in this case she must have done so at the instance of her brother and without any knowledge of the probable consequences, and her conviction was consequently improper.

(1) (1914) 19 Cal. W. N. 28 (*Ram Ranjan Ray v. King-Emperor*).

Appeal from the order of E. T. Bhan, Esquire, Magistrate, 1st Class, with section 30 powers, Gurdaspur, dated the 16th July 1915.

Muhammad Hussain, for Appellants.

Bhagat Ram Puri, for Respondent.

The judgment of the learned Judge was as follows :—

SCOTT-SMITH, J —The appellants, Badru and Mussammat 29th Jan. 1916.

Mehran, brother and sister, have been convicted of abducting Mussammat Mehran, daughter of Bakha, under section 366, Indian Penal Code. Badru has also been convicted of raping the abducted girl under section 376, Indian Penal Code. He has been sentenced to 7 years' rigorous imprisonment for each offence, the sentences to run concurrently. Mussammat Mehran has been sentenced to 1½ year's rigorous imprisonment.

Malik Muhammad Hussain in arguing the appeal has confined himself to urging:—

1. That Mussammat Mehran, owing to her youth, is not guilty of any offence.
2. That the offence of rape is not proved
3. That the sentence under section 366 is too heavy.

As to (1) the appellant, Mussammat Mehran, is only 13 or 14 years of age. For the offence under section 366 a special intent or knowledge is necessary, and I do not see how it can be said that a child of Mussammat Mehran's age had the specific intent or knowledge referred to in the section. If she did help to deceive the abducted girl, she must have done so at the instance of her brother, and without any knowledge of the probable consequences. Badru may not have told her at all that he was going to take the child away, the intent or knowledge which one would presume in a person of mature understanding cannot be presumed in a child of Mussammat Mehran appellant's age. I cannot understand how a Magistrate of experience could bring himself to convict under those circumstances, and still less can I understand why he sentenced such a young child to 1½ year's rigorous imprisonment. It is to be regretted that no application for bail was presented on her behalf. I accept the appeal of Mussammat Mehran and acquit her and order her release forthwith.

[The remainder of the judgment is not required for the purposes of this report.—ED.]

No. 14.

Before Hon. Mr. Justice Rattigan.

TOTA RAM—(CONVICT)—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 154 of 1915.

Indian Companies Act, VI of 1882, sections 48, 50—complaint by a clerk for Registrar, Joint Stock Companies—plea that accused though acting as director was not properly qualified and that accused was not appointed a director until after date when penalty first accrued.

Held, that under Punjab Government Notification No. 3, dated the 3rd February 1910, published in the *Punjab Gazette* of the 25th February 1910, the Registrar of Joint Stock Companies is empowered to authorize any person to institute complaints of offences under the Companies Act and that therefore the complaint filed in this case by a clerk duly authorised by the Registrar was a proper complaint.

35 P. W. R. (Cr.) 1910 (1), distinguished.

Held also, that a person who acts as a director or manager of a company cannot set up in answer to a penalty under section 50 of the Companies Act, that he was not legally a director or manager as, *e. g.*, that he did not hold the requisite number of shares to qualify him for the post of director.

L. R. 10 Q. B. 329 (2), referred to.

Held further, that it is the bounden duty of a company and its directors and managers to forward to the Registrar the summary and list specified in section 48 of the Act, and that this obligation does not come to an end on the date on which, by default of the company, directors and managers, the penalty begins to accrue, and consequently the fact that an accused person did not become a director or manager until after the date when the penalty first accrued is immaterial, though he could not be punished for the period of the default prior to his becoming a director or manager or acting as such.

48 L. T. 675 (3) and 1891 Q. B. 588 (596) (4), referred to.

Revision from the order of Khan Sahib Sheikh Amir Ali, Sessions Judge, Multan, dated the 28th May 1915.

Nand Lal, for Petitioner.

Additional Government Advocate, for Respondent.

The Judgment of the learned Judge was as follows :—

10th Feb. 1916.

RATTIGAN, J.—On the 17th February 1914 one Jhanda Singh described as “companies clerk acting under the instructions of the Registrar, Joint Stock Companies, Punjab,” filed two written complaints, through the Public Prosecutor, Multan, in the Court of the District Magistrate, Multan, against the individuals who were alleged in the said complaints to have

(1) 35 P. W. R. (Cr.) 1910 (*Crown v. Shib Das*).

(2) (1875) L. R. 10 Q. B. 329 (*Gibson v. Barton*).

(3) 48 L. T. 675 (*Reg. v. Catholic Insurance Coy*).

(4) 1891 Q. B. 588 (596) (*Queen v. Tyler*).

committed offences under (1) sections 48 and 50 of the Indian Companies Act (VI of 1882) ; and (2) under section 74 of the Act.

The said persons were (1) Baba Jaswant Singh, Bedi ; (2) Sardar Ganga Singh ; (3) Chaudhri Isar Singh ; (4) S. Tikam Das Chandan Das ; (5) Mehta Ram Kishen ; (6) Lala Hakim Rai ; (7) Lala Sidhu Ram ; (8) D. Tota Ram ; (9) Lala Dida Ram Talwar ; and Lala Punna Lal. Of these persons Chaudhri Isar Singh appears to have died pending the trial and proceedings against him accordingly abated. Of the others, all were described as Directors of the Derajat Sindh Bank, Limited, with the exception of Lala Punna Lal who was described as General Manager of the said Bank.

The complaint under section 50 of the Act further charged an offence thereunder on the part of the said Bank itself.

The two complaints were transferred by the District Magistrate to Mr. Brayne, Magistrate, 1st Class, Multan, for trial and on the 10th November 1914 the latter delivered a consolidated judgment which dealt with both complaints. The learned Magistrate found (1) *as regards the complaint under section 50*, that Dida Ram ; Chandan Das ; Punna Lal ; Sidhu Ram ; Tota Ram ; Hakim Rai and the Derajat Sindh Bank, Limited, were guilty and sentenced each of them to a fine of Rs. 1,000 ; but that Jaswant Singh, Ganga Singh and Ram Kishen were not guilty and must be acquitted ; (2) *as regards the offence under section 74 of the Act*, that Punna Lal ; Tota Ram ; Sidhu Ram ; Hakim Rai ; Jaswant Singh ; and Chandan Das were guilty, and sentenced them each to pay a fine of Rs. 1,000 ; that Ganga Singh, Dida Ram and Ram Kishen were not guilty and must be acquitted.

The convicted persons appealed to the Sessions Judge, Multan, who by his judgment, dated 28th May 1915, rejected all the appeals and maintained the sentences awarded by the Magistrate.

Baba Jaswant Singh, who was convicted under section 74 of the Act has not moved further in the matter, but the other convicted persons including the Bank have through their respective counsel, applied to this Court to revise the orders of the Magistrate and Sessions Judge upon various grounds, most of which are common to the cases of all the petitioners, though some are peculiar to the particular petitioners concerned. I shall deal in this judgment with all the cases and in the first instance with the grounds common to all. The *first contention* is that there was no proper complaint upon which the Magistrate

could take cognizance of the offences. Reliance is placed upon the ruling of a Single Bench of this Court reported as No. 35 P. W. R. 1910 (1) and it is urged that the complaint should have been preferred by the Registrar of Joint Stock Companies, whereas it was in fact preferred by a clerk of his office. I confess I have myself doubts as to the correctness of the ruling cited, but it is not necessary for me to consider that question as the decision was based upon a Notification of the Punjab Government issued in 1883, which has since been superceded by Punjab Government Notification No. 3, dated the 23rd February 1910 and published in the *Punjab Gazette* of the 25th February 1910. Under this latter Notification the Registrar is empowered to authorize any person to institute complaints of offences under the Act, and that the clerk who filed the complaints was duly authorized by the Registrar is apparent not only from the complaints themselves but also from the letter of the Registrar which has been filed as Exhibit P. 32. I might further note that this objection was not taken either in the Magistrate's Court or before the Sessions Judge on appeal. I accordingly overrule it.

It is next urged, in connection with the complaint which relates to the offence under sections 48 and 50 of the Act, that the meeting of the Company which took place on the 20th December 1912 was not an ordinary general meeting of the company within the meaning and for the purposes of section 48, but was an Extraordinary General Meeting convened simply and solely for the purpose of confirming the resolution passed at the Extraordinary General Meeting held on the 3rd December 1912. It is alleged that, in spite of the express provision in article 74 of the Company's Articles of Association, in point of fact no ordinary general meeting of the company was held at any time within six months from the date of registration of the company, and that consequently no offence could possibly have been committed under sections 48 and 50 of the Act. This is, of course, an entirely erroneous view of the law, (see *Park v. Lawton*, 80 L. J. K. B. 396 (2); *Edmunds v. Foster*, 45 L. J., Mag. Cases 41) (3), but I need not discuss it, as the only question before me, upon the complaint, is whether in fact the meeting of the 20th December 1912 was an ordinary general meeting or an extraordinary general meeting. This is a question of fact to be determined from the evidence on the record, and both the Magistrate and the Sessions Judge, after full consideration, have decided that it was an ordinary general meeting

(1) 35 P. W. R. (Cr.) 1910 (*Crown v. Shib Das*).

(2) (1911) 80 L. J. K. B. 396 (*Park v. Lawton*).

(3) (1875) 45 L. J. Mag. Cases 41 (*Edmunds v. Foster*).

They have given excellent reasons for arriving at this conclusion and nothing that I have heard in argument before me has convinced me that they have fallen into any error. It seems to me, on the contrary, that Exhibits P. 5 and 6 (read with Exhibit P. 15) and Exhibit P. 21 are in themselves sufficient to prove that the meeting was the ordinary general meeting of the company, though as a matter of fact, the only business that had to be transacted at that meeting happened to be the confirmation of the resolution passed at the extraordinary general meeting of the 3rd December.

The third ground for revision was that the petitioners were not guilty of any offence under sections 48 and 50 because they were not legally qualified under the Articles of Association of the Company to act as directors, inasmuch as they held no shares at all in the company, or at all events not the requisite amount of shares to qualify them for the post of director. In this connection it is further contended on behalf of Lala Dida Ram Talwar, that he parted with all his shares on the 22nd December 1912 and he could not thereafter be rightly regarded as a director of the company, while on behalf of Sidhu Ram, Hakim Rai and Tota Ram, it is urged that they became directors only after the offence under sections 48 and 50 had, according to the complaint, become complete, *i.e.*, on the 10th January 1913, and that they cannot accordingly be held liable in respect of that offence.

In my opinion there is no force in these contentions. There is ample evidence on the record to show that all the petitioners, whether qualified or not to act as directors, did in point of fact act as such for a long time after the default was made, and in *Gibson v. Barton* (*L. R. 10 Q. B. 329*) (1), Blackburn and Lush, JJ. held (contrary to the opinion of Quain, J.) that a person who acts as a director or manager of a company cannot set up in answer to a penalty under section 27 of the English Act (corresponding to section 50 of the Indian Act of 1882) that he was not legally a director or manager. He becomes a director *de son tort*, and cannot protect himself from the liability cast upon a director by the act by saying: "I am not a director *de jure*." The case of *Lala Punna Lal Mukhi* is very similar. He was one of the original directors of the company and was appointed manager on the 29th May 1913. It was he who issued the notorious prospectus which figures as exhibit 7 and it was he who carried on most of the dilatory correspondence

(1) (1875) *L. R. 10 Q. B. 329* (*Gibson v. Barton*).

with the Registrar of Joint Stock Companies. Dida Ram according to the Magistrate, left the company in April 1913 but till then he was undoubtedly acting as a director.

The argument that the offence was complete on the 10th January 1913 and that no one who became a director or manager after that can be held liable in respect of the complaint under sections 48 and 50 of the Act, is based on the misapprehension that the offence is not a continuing one and that the persons in default can by paying the penalty relieve themselves of all liability to comply with the provisions of section 48. That such is not the law is clear from *Reg. v. Catholic Insurance Company* 48 L. T. 675 (1) and *Queen v. Tyler*, (1891, Q. B. 588) (2). As remarked by Kay L. J. in the latter case (page 596).

“Section 25 requires a company to keep a register of its members; and section 26 requires a company once a year to make a list of members of the company, specifying certain particulars such list to be contained in a separate part of the register, and to forward a copy of the list to the Registrar of the Joint Stock Companies. By section 32 the register is to be open to the inspection of the shareholders and the public. The object, therefore, is that this list which is contemplated by section 26 should be entered in the company's register so as to be open to inspection. That is a very important duty in the interests not only of the shareholders, but also of the public, who have the right, upon payment of a mere nominal sum to inspect the register and list. Sections 25 and 26 being imperative in their terms and imposing upon the company the duty of keeping this register and inserting in it from time to time this list, and forwarding a copy of the list to the Registrar, section 27 imposes a penalty for the omission to forward the list. I think it is impossible to read section 27 without seeing that the penalty is not intended to be the equivalent for the omission to perform the duty imposed upon the company by section 26, but is of such a nature that the company cannot by paying the penalty continue to neglect to perform the duty, because the penalty imposed is a penalty of 5 £ a day during which the default continues.”

It is thus clear that it is the bounden duty of the company and of its directors and managers to forward to the Registrar the summary and list specified in section 48 of the Act and that this obligation does not come to an end on the date on which by default on the part of the company, directors and managers, the

(1) 48 L. T. 675 (*Reg. v. Catholic Insurance Coy.*).

(2) 1891 Q. B. 588 (596) (*Queen v. Tyler*).

penalty begins to accrue. I hold, therefore, that every person who at any time during the default in complying with the provisions of section 48, acted as director or manager of the company and the company itself were rightly convicted of the offence under sections 48 and 50 of the Act and that it is immaterial that some or all of those persons, were not legally qualified to act as directors or managers or that they did not in fact become directors or managers until after the date when the penalty first accrued. At the same time I would be prepared to hold that a person who became, or acted as, a director or manager after such date could not be punished for the period of the default prior to his becoming a director or manager or acting as such. In other words, to take a concrete case, I think that Tota Ram could not be punished by fine for the default prior to the date when he became a director (*i. e.*, the 26th February 1913), but that he would be liable to the penalty for every day thereafter while the default still continued. But as the fines inflicted on the petitioners do not in any case exceed the amounts to which they would be liable on this view of the law, I need not further dilate upon it.

As regards the petitioners who were convicted under section 74 of the Act, little has to be said. It is not denied that the balance sheet was not filed with the Registrar within the prescribed period, but it is urged that the petitioners did not "knowingly and wilfully authorise or permit such default" inasmuch "as they were awaiting the decision of the Registrar upon the amalgamation question." In this connection I have been referred to the correspondence between the company and the Registrar (Exhibits P. 13, 14, 15 and 16). I am unable to see how this correspondence helps the petitioners. They must be assumed, as ordinary business men, to know the law, and that they were not ignorant of the mandatory provisions of section 74 of the Act is obvious from Lala Sidha Ram's letter (Exhibit D. 38), dated the 15th August 1913. In that letter addressed to the manager, Punna Lal the writer points out that unless the balance sheet is submitted within time a fresh complaint will probably be made and requests that it may be prepared and submitted within the prescribed period. No doubt this letter shows that Lala Sidha Ram was anxious at the time to have the balance sheet sent in by due date, but the fact remains that he knew that it had not been prepared and that he took no steps thereafter to insist on the law being complied with. The Magistrate and the Sessions Judge are both satisfied that the default in respect of the balance sheet was wilful and due to anxiety on the part of the directors and managers to conceal as long as they

could the true state of affairs, I see no reason to take a different view, even if I had jurisdiction to do so.

As a result, then, I hold that the petitioners were rightly convicted of the offences for which they have respectively been punished. The sentences are heavy, but in view of the abuse of the provisions of the Companies Act that was unfortunately rife at the time and of the widespread mischief and loss resulting therefrom, I think exemplary punishments were necessary. I accordingly reject all the petitions.

Revisions rejected.

No. 15.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Shah Din.*

THE CROWN—APPELLANT,

Versus

NAWAB—RESPONDENT.

Criminal Appeal No. 703 of 1915.

Opium Act, I of 1878, section 9, clauses (c) and (e)—what constitutes offence—appeal by Government against acquittal.

The facts found were that the accused N. was searched on entering the train for Delhi at Abohar but only a legitimate amount of opium was found on him. At the next station A., a servant of N.'s, who was about to enter the train there, was searched and on him was found concealed in his bedding 10 seers 6 chittaks of opium. A. admitted this but said he carried it on behalf of his master while N. asserted that he knew nothing about the matter and that A.'s possession was on his own account. Upon these facts the Magistrate convicted N. not only of being in possession of opium unlawfully but also of exporting the same unlawfully. These convictions were set aside by the Sessions Judge on appeal and against this acquittal the Government preferred an appeal to the Chief Court.

Held, that having regard to the definition of the term "export" in section 3 of the Opium Act it was clear that N., even if he was in possession of the opium through his servant, was not guilty of the offence of "exporting" opium under clause (c) of section 9 of the Act.

Held also, that the learned Sessions Judge, following *I. L. R. 39 Cal. 344 (1)*, was right in holding that as the opium was found in the possession of A. it was for the prosecution to prove affirmatively and clearly that the possession of A. was merely that of a servant acting under the authority of his master N., and as his finding that this had not been proved was reasonable, there was no ground for setting aside his judgment of acquittal.

7 P. R. (Cr.) 1904 (p. 24) (2), referred to.

(1) (1911) *I. L. R. 39 Cal. 344* (*Uttam Chand v. Emperor*).

(2) 7 P. R. (Cr.) 1904 (p. 24) (*King-Emperor v. Chaitar Singh*).

Appeal from the order of Major B. O. Roe, Sessions Judge, Ferozepore, dated the 12th March 1915.

Additional Government Advocate, for Appellant.

Nemo, for Respondent.

The Judgment of the Court was delivered by—

RATTIGAN, J.—This is an appeal by the Local Government, under section 417, Criminal Procedure Code, from the order of the Sessions Judge, Ferozepore, acquitting the respondent, Nawab, who had been convicted by the Magistrate, 1st class, of offences under section 9, clauses (c) and (e) of the Opium Act, 1878, and sentenced on each count to one year's rigorous imprisonment and a fine of Rs. 1,000.

The facts are stated in detail in the judgment of the Magistrate, but it is unnecessary for the purposes of this appeal to recapitulate them. It is sufficient to say that the Police had received information from one Sher Ali, a dismissed servant of Nawab, that the latter and his present servant Abbas, had been to Abohar for the purpose of buying large quantities of opium which they intended to export to Burma. On the 23rd March 1914, Nawab entered the train for Delhi at Abohar and was promptly arrested and searched, but only a very small, and quite legitimate amount of opium was found upon him. His servant, Abbas, was not with him, but the police had been led to suspect that Abbas would enter the train at the next station, Pakki, and had accordingly made arrangements for his arrest there. Their suspicions were well-founded, and Abbas was duly arrested and searched, with the result that 10 seers 6 chittaks of opium were found concealed in his bedding.

Abbas admitted at the trial that the opium was found in his bedding but endeavoured to exculpate himself by saying that he was in possession of it under the directions and on behalf of his master, Nawab. Nawab, on the other hand, asserted that he knew nothing about the matter and that Abbas' possession was on his own account.

Upon these facts the Magistrate convicted Nawab not only of the offence of being in possession of opium unlawfully, but also of exporting the same unlawfully, and sentenced him in respect of each offence to the maximum penalty.

Obviously, the conviction under clause (e) of section 9 of the Act was erroneous, as there had then been no export of the opium, (see the definition of the term, "export" in section 3 of the Act). Assuming for the sake of the present

argument, that Nawab was in possession of the opium through his servant, Abbas, and that he *intended* eventually to export it, we cannot hold that he was guilty of the offence of exporting it. Mr. Broadway conceded that in any event the conviction under clause (e) had been rightly set aside as erroneous and we entirely agree.

As regards the conviction under clause (c), the learned Sessions Judge held, upon the authority of *I. L. R. 39 Cal. 344* (1), that as the opium was found in the possession of Abbas, it was for the prosecution to prove affirmatively and clearly that the possession of Abbas was merely that of a servant acting under the authority of his master, Nawab. The learned Judge further held that the prosecution had failed to prove that, as regards the particular opium found in Abbas' possession, the latter was in possession thereof on his master's behalf and with his master's authority, the mere facts that Abbas and Nawab were in each other's company at Abohar and that Abbas was the servant of Nawab being quite compatible with the suggestion that Abbas was "doing some private smuggling on his own behalf." He accordingly acquitted Nawab for want of proof of his complicity and after hearing Mr. Broadway, we are of opinion that the view taken by the learned Judge was perfectly reasonable.

We were told that Nawab is a well known professional dealer in illicit smuggling of opium; that his visits to Abohar synchronised always with a large increase of sales of opium by the licensed vendor, Midda Mal, (who was also convicted at this trial); that correspondence between him and his father showed that Nawab was engaged in this unlawful and lucrative business, and that his former servant, the informer Sher Ali, had deposed to the *modus operandi* and had sworn to previous transactions in which he had carried the opium for his then master. Accepting all these facts as duly established, we still fail to see how it can be held that, *as regards the particular transaction with which we are concerned*, anything more than a case of suspicion can be said to have been established against Nawab. It is not proved that he purchased these 10 seers 6 chittaks of opium, and it is only mere surmise that Abbas was in possession thereof on his behalf. No doubt, Abbas is a poor man who possibly could not himself afford to purchase such a large quantity of opium, though here again we are in the region of conjecture, but even so, it does not follow that Abbas was not acting on behalf of his employers other than

Nawab. Sher Ali as a dismissed servant with an obvious desire to get his late master into trouble, is hardly a witness of credibility, and the increase of sales at Midda Mal's shops also synchronised, it is to be remembered, with the visits of Sher Ali to Abohar. But be this as it may, the fact that Nawab is suspected of being concerned in illicit smuggling of opium does not establish his guilt as regards the transaction with which alone we are concerned, and we cannot agree that the Sessions Judge took an unreasonable view when he held that as regards this transaction, it was quite possible that Abbas, upon whom the opium was actually found, was in possession of it on his own behalf.

It is impossible to hold that this finding is so clearly and palpably wrong on the evidence as to justify us in setting aside his judgment of acquittal, (see No. 7 *P. R.* 1904 *Cr.* at page 24) (1). We accordingly reject this appeal.

Appeal rejected.

No. 16.

Before Hon. Mr. Justice Shadi Lal and Hon. Mr. Justice Leslie Jones.

THE CROWN

Versus

J AISUKH—ACCUSED.

Criminal Revision No. 1084 of 1915.

Criminal Procedure Code, Act V of 1898, sections 408, and 413—appeal in cases where several accused are convicted and one is sentenced to an appealable sentence and another to a fine of Rs. 40.

Held, that where at a joint trial of two or more persons by a first class Magistrate an appealable sentence is passed upon any one of them, all those convicted have under section 408 of the Code of Criminal Procedure the same right of appeal, including those whose sentences are of the kind against which appeal would have been barred by section 413 if they had been tried singly.

9 *Cr. L. J. R.* 356 (*F. B.*) (2), followed.

5 *Cr. L. J. R.* 196 (3), referred to.

5 *Bom. H. C. R. (C. C.)* 24 (4), and 7 *Bom. H. C. R. (C. C.)* 35 (5), distinguished.

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- (1) 7 *P. R. (Cr.)* 1904 (p. 24) (*King-Emperor v. Chattar Singh*).
 - (2) (1908) 9 *Cr. L. J. R.* 356 (*F. B.*) (*Ba Thaw v. Emperor*).
 - (3) (1907) 5 *Cr. L. J. R.* 496 (*Palani Koratan v. Emperor*).
 - (4) (1868) 5 *Bom. H. C. R. (C. C.)* 24 (*Reg v. Muliya Nana*).
 - (5) (1870) 7 *Bom. H. C. R. (C. C.)* 35 (*Reg v. Kalubhai*).

*Case reported by C. I. Dundas, Esquire, Sessions Judge, Delhi,
with his No. 620 of 30th June 1915.*

Nemo, for Appellant.

Nemo, for Respondent.

The Order of the Chief Court was delivered by—

26th Feb. 1916.

LESLIE JONES, J.—On trial by a 1st class Magistrate, Jaisukh and his three sons were convicted of an offence under section 353, Indian Penal Code. Each of the sons received a sentence of two months' rigorous imprisonment but that of their father, Jaisukh, was one of a fine of Rs. 40 only. All four preferred an appeal to the Court of the Sessions Judge, Delhi, who accepted the appeal of the sons, but, holding that the appeal of Jaisukh could not be treated otherwise than an application for revision, has forwarded it to this Court with a recommendation that the conviction be set aside.

The case has been referred to a Division Bench for decision of the question whether if at the joint trial of two or more persons by a first class Magistrate, an appealable sentence is passed upon any one of them, all those convicted have the same right of appeal, even though their sentences may be of the kind against which appeal would have been barred by section 413 of the Code of Criminal Procedure, if they had been tried singly.

There is a recent unpublished judgment of a Single Bench of this Court in case No. 2005 of 1915 in which this question has been answered in the affirmative, though without detailed discussion.

Sohoni's Code of Criminal Procedure in the commentary under section 413 contains a reference to three old cases as authority for the contrary proposition. One of these we have been unable to find; of the others, 5 *Bom. H. C. R., Criminal Cases*, 24 (1) was a case in which a Sessions Judge had entertained an appeal from the order of an Assistant Sessions Judge and it contains no discussion on the point immediately before us

The third ruling, 7 *Bom. H. C. R., Crown Cases*, 35 (2) is one which has been discussed and criticised in the Full Bench ruling of the Chief Court of Burma in Volume 9, *Cr. L. J. R.*, p. 356 (3), in which the whole question is exhaustively discussed. Irwin, C. J., found himself unable to attach much weight to this ruling of the Bombay High Court and in that view we respectfully concur.

As has been pointed out by Irwin, C. J. the true solution of the question depends upon the meaning of the word "cases"

(1) (1868) 5 *Bom. H. C. R. (C. C.)* (Reg. v. *Muliya Nana*).

(2) (1870) 7 *Bom. H. C. R. (C. C.)* 35 (Reg. v. *Kal bhai*).

(3) (1908) 9 *Cr. L. J. R.* 356 (F. B.) (*Ba Thaw v. Emperor*).

in section 413, and where the word "case" is used in the definitions of "cognizable case," "summons case," and "warrant case," it is so used to denote a proceeding relating to an offence in which any number of persons may be dealt with.

The argument of the Chief Judge of the Burma Full Bench continues as follows:—

"If 'case' includes a trial at which two or more persons are convicted, the grammatical meaning of the section, to my mind, is that there shall be no appeal in a case in which no sentence exceeding any of those described in the section is passed on any of the persons convicted. This is consonant with common sense. When the whole case is trivial, finality is of more importance than the correction of possible mistakes; but if a substantial sentence is passed on one person the case is not trivial, and it is obviously expedient that the Appellate Court should have jurisdiction to deal with the whole case if all the persons convicted choose to appeal. If the contrary had been the intention of the legislature, the obvious way to express it beyond the possibility of a doubt would have been to substitute for 'in cases in which' the words 'on whom'."

In this reasoning we entirely agree and we have repeated the passage at length because we do not think that the matter can be better put.

We may here, perhaps, refer by way of analogy to 5 *Cr. L. J. Reports*, p. 496 (1), a case in which the High Court of Madras held that when an Assistant Sessions Judge passes a sentence of imprisonment of four years or upwards on any one of the accused, whether he be the appellant or any other person tried with him in the case, the appeal shall only lie to the High Court, the word "case" in section 408 (b) of the Criminal Procedure Code being thus treated as bearing the same interpretation as that which we think should be put upon the phrase used in section 413.

We hold, therefore, that when more persons than one are convicted at one trial and an appealable sentence be passed upon any one of them, section 413 does not take away from the other convicts the right conferred by section 408.

In exercise of the powers conferred by section 526 of the Criminal Procedure Code and for the convenience of the appellant we transfer his appeal to this Court. We have considered the record and as we agree in the opinion of the learned Sessions Judge that the conviction of the appellant

(1) (1907) 5 *Cr. L. J. R.* 496 (*Palani Koravan v. Emperor*).

under section 353, Indian Penal Code, has not been substantiated, we accept the appeal, acquit the appellant and direct that the imposed fine be refunded.

Appeal accepted.

No. 17.

*Before Hon. Sir, Donald Johnstone, Kt. Chief Judge
and Hon. Mr. Justice Scott-Smith.*

THE CROWN—APPELLANT,

Versus

MUSSAMMAT SOMA AND OTHERS—RESPONDENTS.

Criminal Appeal No. 733 of 1915.

Indian Penal Code, sections 90, 361 and 366—kidnapping—consent of minor—consent of guardian given on a misrepresentation of a fact—Indian Evidence Act, I of 1872, section 3.

Held, that having regard to the definition of the offence of kidnapping given in section 361 of the Penal Code, the essence of the offence is the taking the minor out of the keeping of the guardian *without the guardian's consent* and that the consent of the minor is wholly immaterial.

2 W. R. (Cr.) 5, (1) 2 W. R. (Cr.) 61 (2), 3 W. R. (Cr.) 15 (3), 7 W. R. (Cr.) 36 (4), 7 W. R. (Cr.) 62 (5), 7 Cr. L. J. 210 (6) and 4 P. R. (Cr.) 902 (F. B.) (7), referred to—also Mayne's Criminal Law of India, 4th edition, p. 571.

Held also, that the consent of a guardian given on a misrepresentation of a fact is one given under a "misconception of fact" within the meaning of section 90 of the Penal Code and cannot therefore be useful as a "consent" under any section of the Code.

I. L. R. 36 Mad. 453 (8), referred to.

Held further, that a misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a "fact" within the meaning of section 3 of the Evidence Act.

Appeal from the order of J. K. M. Tapp, Esquire, Magistrate, 1st class, Kangra, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 22nd April 1915.

Additional Government Advocate, B. Bevan Petman and Tek Chand, for Appellant.

Muhammad Shafi, for Respondents.

The Judgment of the Court was delivered by—

22nd March 1916.

SCOTT-SMITH, J.—This is an appeal by the Local Government from the order of a 1st class Magistrate invested with

- (1) (1865) 2 W. R. (Cr.) 5 (*Queen v. Bhungee Ahur*).
- (2) (1865) 2 W. R. (Cr.) 61 (*Queen v. Amgad Bugeah*).
- (3) (1865) 3 W. R. (Cr.) 15 (*Queen v. Koordan Sing*).
- (4) (1867) 7 W. R. (Cr.) 36 (*Queen v. Sookee*).
- (5) (1867) 7 W. R. (Cr.) 62 (*Queen v. Mussammat Oozeerun*).
- (6) (1907) 7 Cr. L. J. 210 (*Nga Te Hla v. Emperor*).
- (7) 4 P. R. (Cr.) 902 (F. B.) (*Fateh Din v. Emperor*).
- (8) (1911) *I. L. R. 36 Mad. 453* (*In re Jaladu*).

powers under section 30 of the Criminal Procedure Code acquitting four persons, Mussanmat Soma, Daya Ram, Bhag Mal and Mussanmat Mansa of offences under section 366 and sections 306/109, Indian Penal Code.

One Lachhman was also tried by the Magistrate, but was discharged, and Mr. Broadway as counsel for the Crown explained that the appeal had been filed against him by mistake.

The facts are given in full detail in the judgment of the Magistrate. The case for the prosecution is that Mussammat Saraswati or Sarasti aged about 14 years and 10 months and her three younger sisters, daughters of Lala Sundar Lal, pleader, deceased, of Simla, were living at Garli in the Kangra District under the guardianship of Hira, P. W. 4, their great-uncle, that on 16th November 1914 Mussammat Soma with the consent of Hira took Mussammat Sarasti and Mussammat Lilawati, a younger sister, away from Garli to pay a visit at the house of Ganga, maternal grandfather of the girls, at Paragpur, that Mussammat Bhagwanti, another sister, had preceded them there, that on Saturday the 21st November Mussammat Soma with the consent of Mussammat Kujan, P. W. 3, the second wife of Ganga, took the three girls away ostensibly to pay a visit to the temple at Jawala Mukhi, that on the way they halted for the night in a *kutiya* some 3 miles distant from Paragpur (see the plan exhibit P. L.), that there they were met by Daya Ram, Bhag Mal and Mussammat Mansa, and Mussammat Sarasti was forced into marrying Daya Ram. After the marriage the girls were all taken to the house of Daya Ram and Bhag Mal at Nagrota where some further ceremonies were performed, and on the 22nd November Daya Ram and others took Mussammat Sarasti to Jowala Mukhi where at the Police Station the marriage was reported. As they were returning from Jawala Mukhi they met a party including Hira and Jiwan Lal, P. W. 7; Mussammat Sarasti and her sister Mussammat Bhagwanti who was with her at once joined the latter, and both parties returned to the Police Station at Jawala Mukhi where further reports were recorded. On the 24th November Mussammat Sarasti's statement was recorded by the Tahsildar, and a police enquiry followed which ended in the trial of the four respondents and Lachhman with the result already stated.

The Magistrate found —

1. That Mussammat Sarasti was under 15 years of age at the time of the alleged offence.

2. That she was living under the guardianship of Hira.
3. That she was taken by Mussammat Soma from the house of Ganga at Paragpur to the *kutiya* where Daya Ram, Bhag Mal and Mussammat Soma met them.
4. That she was there married to Daya Ram with her consent, the whole thing having been arranged "with her collusion and in consultation with her."
5. That Hira was not present at the marriage and had nothing to do with it.

On these findings the Magistrate held that the accused persons were not guilty of any offence, all that they did having been "to aid and abet Mussammat Sarasti in carrying out her own marriage." In other words the Magistrate held that the accused had committed no offence as anything done by them was done with the consent of Mussammat Sarasti.

In appeal Mr. Broadway urges that on these findings the accused ought to have been convicted, the consent of the minor being wholly immaterial in a case of kidnapping. He also disputes the finding of the Magistrate that Mussammat Sarasti herself arranged the marriage or consented to it.

Mr. Shafi for the defence disputes the findings of the Magistrate Nos. 1 and 5; he urges that it is not proved that the girl was under 16 years of age at the time of the occurrence, and that Hira was present and consented to the marriage. He further urges that on the facts as found his clients have not committed any offence.

The main points which we have to consider are—

1. Whether the girl was under 16 years of age at the time of the alleged offence.
2. Whether the lower Court's view of the law is correct.
3. Whether Hira was present at the marriage.
4. Whether the girl herself was a willing party.

As to the first point we have carefully considered the evidence on the record and have no hesitation in agreeing with the Magistrate that Mussammat Sarasti was born about the 13th January 1900 and was therefore about 14 years and 10 months old in November 1914. Lala Mohan Lal, Lala Jai Lal and Hira, P. W's 1, 2 and 7, are the witnesses who depose to her age. The first two are pleaders practising at Simla and are very respectable gentlemen whom we see no reason for disbelieving.

They were fellow students of Lala Sundar Lal in the Government College, and it was during the time they were studying there that Mussammat Sarasti was born. Lala Jai Lal has given very convincing reasons for remembering the approximate date of birth. A daughter was born to him about 10 days previously, see exhibit P. C., and the friends gave the same name to both the girls. At the time of the Probate proceedings relating to Sundar Lal's will, Lala Mohan Lal gave the age of the eldest daughter of Sundar Lal as 11 years, and this agrees with the evidence now given as to her age. At that time there was no dispute about the age and Lala Mohan Lal had no reason for understating it.

Mussammat Sarasti is said to have been born in her maternal grandfather's house at Paragpur, and Mr. Shafi has laid stress on the absence in the Register of births of Police Station Jawala Mukhi of any mention of the birth of a daughter to Sunder Lal in or about January 1900. The absence of such an entry may be due to an omission by the *chaukidar* to report the birth; it certainly does not prove that no such birth took place and by no means can outweigh the very reliable positive evidence of P. Ws. 1 and 2.

According to the defence the girl was born at Garli, and a copy of an entry showing the birth of a daughter to one Sundar of that village in 1896 has been put in evidence, but there is no proof that that entry refers to Sundar Lal, deceased, father of Mussammat Sarasti.

Coming to the second point the definition of the offence of kidnapping as given in section 361 of the Indian Penal Code is as follows:—

"Whoever takes or entices any minor
under 16 years of age if a female out of the
keeping of the lawful guardian of such minor
without the consent of such guardian, is said to kidnap such
minor from lawful guardianship." It will be
observed that the essence of the offence is the taking of the
minor out of the keeping of the guardian *without the guardian's
consent*. Nothing is said in the section about the consent of
the minor, and such consent is wholly immaterial, see the
Criminal Law of India by Mayne, 4th Edition, p. 571, and the
following authorities, 2 W. R. (Criminal) p. 5 (1) and p. 61 (2),
3 W. R. (Criminal) p. 15 (3), 7 W. R., p. 36 (4) and p. 62 (5),

(1) (1865) 2 W. R. (Cr.) 5 (*Queen v. Bhungee Ahur*).

(2) (1865) 2 W. R. (Cr.) 61 (*Queen v. Amgad Bngeah*).

(3) (1865) 3 W. R. (Cr.) 15 (*Queen v. Koordan Sing*).

(4) (1867) 7 W. R. (Cr.) 36 (*Queen v. Sookce*).

(5) (1867) 7 W. R. (Cr.) 62 (*Queen v. Mussammat Oozeerun*).

7 Cr. L. J., p. 210 (1) and 4 P. R. of 1902 (Criminal) (2). We hold therefore that if the other elements of the offence are present, the mere fact that the girl herself was a consenting party is quite immaterial.

We now come to the third point namely whether Hira himself arranged and was present at the marriage.

On the side of the prosecution we have the positive evidence of Mussammat Sarasti, of her sister Mussammat Bhagwanti and of Hira himself that the latter had nothing to do with the marriage and was not present at it.

On the side of the defence a number of witnesses have been produced who say Hira was present at the marriage and gave the girl away. It is obvious that the witnesses on one side or the other have perjured themselves.

Mr. Shafi has addressed lengthy and elaborate arguments to us with the object of shewing that Hira's conduct and all the circumstances of the case make it *prima facie* probable that he was a party to the marriage. Mussammat Sarasti had shortly before the occurrence been betrothed to one Mehr Chand, who had already lost two wives, and the marriage was to have taken place on the 29th November 1914; the exhibits D. A. and D. B. shew that the betrothal had taken place and D. A. which was written by Hira, shews that he knew all about it. Mehr Chand is through his deceased wives connected with Lala Mohan Lal, one of the executors of Lala Sundar Lal's will who had to be consulted about the betrothals and marriages of testator's daughters. Mr. Shafi has laboured to shew that the betrothal of the girl to Mehr Chand was effected by Lala Mohan Lal and Lala Jiwan Lal and was distasteful to Hira and Mussammat Sarasti. We can find nothing on the record to support the theory that Hira objected to the proposed match. There is nothing in the post card Exhibit D. A. of 2nd November 1914 which was written by Hira which lends any support to such a theory. On the contrary the existence of this post-card militates against the allegation of Daya Ram that Hira married Mussammat Sarasti to him.

On the morning of Saturday, the 21st November, Hira sent a message by one Sundaroo, P. W. 11, to Mussammat Sarasti and her sisters at Paragpur that they should return to his house; according to Sundaroo Mussammat Sarasti said they

(1) (1907) 7 Cr. L. J. 210 (*Ngũ Te Hlā v. Emperor*).

(2) 4 P. R. (Cr.) 1902 (F. B.) (*Fateh Din v. Emperor*).

would return that evening or at latest on the third day. Mr. Shafi urges that the probability is that they returned at once, and in support of his contention refers to Hurbansa D. W. 22 who says he met them on the way. What counsel wishes us to hold is that the girls returned to Hira on the Saturday, and that on the evening of that day he took Mussammat Sarasti to Balar and gave her away in marriage to Daya Ram. This theory pre-supposes that Hira disapproved of the proposed marriage with Mehr Chand and for fear of unpleasantness married the girl at a place remote from Garli and Paragpur, instead of openly at his own house in Garli as one would expect.

The strongest piece of evidence against the defence theory is the first report of the marriage which was made at the Jawala Mukhi Police Station by Daya Ram on the 22nd November 1914; it is Exhibit P. D. The gist of it is that Hira betrothed Mussammat Sarasti to some man at Garli, but that she was not agreeable to the match, and the previous day had sent for him to Balar and married him of her own free will. Mussammat Sarasti corroborated Daya Ram, giving the same reason for the marriage as he had done.

Mr. Shafi explains this report by saying that Hira, though he had married Mussammat Sarasti to Daya Ram, arranged with the latter that his part in the marriage should not be disclosed, as he was afraid of having unpleasantness with Mohan Lal and Jiwan Lal, who wanted the girl to be married to Mehr Chand. He also says that so long as Hira said nothing in support of Jiwan Lal's complaint against the accused persons they kept faith with him and did not say that he himself had arranged the marriage.

Now though Daya Ram and Mussammat Sarasti might have agreed not to mention Hira's name when reporting the marriage at the Police Station, we do not think they would have gone out of their way to say that Hira had wanted to marry the girl to some one else, and that in order to escape from that match the girl had sent for Daya Ram and married him.

We also agree with the Magistrate that when, after Jiwan Lal had taken Mussammat Sarasti and Mussammat Bhagwanti away from Daya Ram and his party, and both parties went to Jawala Mukhi Police Station and made reports, Daya Ram would not then have kept quiet as to the part played by Hira in the marriage. Jiwan Lal was accusing him and other members of his family of kidnapping a girl under 16

years of age and of getting her married against her will. Hira was one of Jiwan Lal's party when they met Daya Ram, Bhāg Mal and the girls returning from Jawala Mukhi.

Daya Ram complained that the members of the other party had threatened him and used force, but he said not a word about Hira having given the girl to him in marriage; if he had said this and been able to prove it, it would have been a complete answer to Jiwan Lal's complaint.

We have perused the police diaries and can find nothing in them in support of the allegation that Hira arranged and was present at the marriage. A number of the persons who have given evidence for the defence were examined by the police during the investigation, but neither any of them or of the accused ever appear to have suggested such a thing.

We are not at all impressed with Mr. Shafi's argument that, because on arrival at Jawala Mukhi it was Jiwan Lal alone who went and made the report, it is therefore clear that Hira was not willing to support him. Hira is an old man of 66; Jiwan Lal is only 39 and one of the executors of Sundar Lal's will. He probably took the leading part and we cannot see anything suspicious in the fact that on arrival at Jawala Mukhi late at night Hira and Mussammatt Sarasti, who must have been very much fatigued, did not go to the Police Station.

When Hira first heard the rumour of the marriage at Garli he hastened to Paragpur. He says he found women weeping in the house of Ganga, so did not make any enquiries, but went at once to consult with Jiwan Lal. Mr. Shafi says that his natural course would have been to make enquiries first at Ganga's house if the marriage had really taken place without his knowledge and consent. We however, see nothing suspicious in Hira's going to Jiwan Lal and consulting him as to the proper course to pursue.

We have considered the point very carefully, and we have no hesitation in holding that Hira was not present at the marriage and did not consent to it, and knew nothing about it until the day after.

The defence witnesses who say that Hira was at the marriage are in our opinion lying.

The question whether the girl herself consented to the marriage is not very important having regard to the view we take of the law, but a more lenient view might be taken of the conduct of the accused if the girl herself

arranged the marriage or consented to it. We are unable to accept the Magistrate's conclusion that the whole affair was carried out with the collusion and in consultation with Mussammat Sarasti and all that the accused did was to aid and abet her in arranging and carrying out her own marriage. It is *prima facie* very improbable that a girl under 15 years of age who is not alleged to be unduly developed, should have behaved in the way suggested. She had recently been betrothed to Mehr Chand and though he had already lost 2 wives, we see no reason to suppose that the girl was averse to marrying him. Moreover the theory put forward by the Magistrate goes a good way beyond what the accused themselves said namely that Hira arranged the marriage and gave away the bride. The evidence that the girl was a consenting party to the marriage is that of persons who have in our opinion perjured themselves by saying that Hira was present, and we therefore do not consider it to be entitled to any credit. There is certainly the statement made by the girl the next day at the Jawala Mukhi Police Station that she had married Daya Ram of her own free will, but a young girl in her position could easily, we think, have been persuaded by that time to accept what appeared to be inevitable and to make the best of it. We see no reason why we should not believe the evidence of Mussammat Sarasti and Mussammat Bhagwanti according to whom the marriage was a surprise, though they may have exaggerated as to the resistance offered by the former.

We hold then that Mussammat Sarasti was not a consenting party to the marriage, though afterwards she may have become resigned and accepted the accomplished fact.

Mr. Shafi's final argument was something as follows. The girls left Hira's house at Garli to visit their grandfather at Paragpur with the consent of Hira. On the 21st November Mussammat Somá took them from Ganga's house with the consent of Mussammat Kujan, his wife, to pay a visit to the shrine at Jawala Mukhi; they actually went to that place, and if on the way Mussammat Sarasti was married to Daya Ram without Hira's consent such marriage would not of itself amount to kidnapping.

The case reported in *I. L. R. 36 Mad.* at page 453 (1) is very similar to the present one. Therein it was held that a consent given on a misrepresentation of a fact is one

(1) (1911) *I. L. R. 36 Mad.* 453 (*In re Jaladu*).

given under a misconception of fact within the meaning of section 90, Indian Penal Code, and as such is not useful as a consent under the Penal Code. A misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a "fact" within the meaning of section 3 of the Evidence Act. In the present case the consent of Hira, and later that of Mussammat Kujan, were obtained by Mussammat Soma's misrepresentation of her intentions in regard to the girl Mussammat Sarasti even if it be supposed that no offence had been committed before she took Mussammat Sarasti from Ganga's house, the offence of kidnapping was complete when she took her from there. Her intention was to marry the girl to Daya Ram, and she obtained Mussammat Kujan's consent to the taking away of the girl by misrepresenting her intention. The consent thus obtained was not a consent within the meaning of section 90 of the Penal Code.

The question of abetment by Daya Ram, Bhag Mal and Mussammat Munsa has been fully dealt with by the Magistrate who held that if the facts were as alleged they had certainly abetted the actual kidnapping by Mussammat Soma. No arguments have been addressed to us by either side on this part of the case and it is therefore sufficient for us to say that we agree with the Magistrate that the charge of abetment by the persons in question has been fully established.

Mr. Shafi has laid some stress on the fact that the present is an appeal from an order of acquittal and has referred us to 7 P. R. of 1904 (Cr.) (1) and to other rulings dealing with such appeals. We have no quarrel with the principles enunciated in these rulings, but they are not really applicable in the present case, for we hold that the Magistrate has erred in law and ought on the facts as found by him to have convicted the accused persons.

We accordingly accept the appeal and setting aside the order of acquittal convict Mussammat Soma of an offence under section 333, Indian Penal Code, and Daya Ram, Bhag Mal and Mussammat Munsa of offences under sections 333-103, Indian Penal Code.

[The remainder of the judgment is not required for the purposes of this report.—Ed]

Appeal accepted.

(1) 7 P. R. (Cr.) 1904 *King-Emperor v. Chatter Singh*.

No. 18.

Before Hon. Mr. Justice Rattigan.

TOTA RAM AND OTHERS—(CONVICTS)—PETITIONERS,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 1515 of 1915.

Indian Companies Act, VI of 1882, section 74—default in filing Balance sheet with the Registrar, Joint Stock Companies—responsibility of Managing Agents and Directors.

Held, that a Director of a Company cannot escape liability for the penalty laid down in section 74 of the Companies Act of 1882 for not filing the Balance sheet in time with the Registrar of Joint Stock Companies on the ground that he depended upon the Managing Agents of the Company or another Director to see to it and had urged them on several occasions to do the needful,

Held also, that Managing Agents entrusted with the management of a Company, subject to the control of the Directors, are Managers within the meaning of section 74 and as such liable to the penalty prescribed by the section.

Held further, that the fact that one of the Directors was also a member of the Firm which acted as Managing Agents on whom the penalty had been imposed as such, was no ground for not imposing upon him the penalty also in his other capacity as a Director.

Petition for Revision of the order of Khan Sahib Sheikh Amir Ali, Sessions Judge, Multan, dated the 28th May 1915.

Nand Lal, for Petitioners.

Assistant Legal Remembrancer, for Respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—This judgment will dispose of this petition and also of the connected petitions for revision, Nos. 1812 and 1713 of 1915. The petitioners are (1) Tota Ram; (2) the Firm of "Tota Ram and Brothers"; (3) Ram Kishen and (4) Punnun Lal. They have all been convicted by Mr. Brayne, Magistrate, 1st class, Multan, of an offence punishable under the last paragraph of section 74 of the Indian Companies Act, 1882, and sentenced each to pay the fixed fine of Rs. 1,000. The convictions and sentences having been upheld by the Sessions Judge on appeal, petitions for revision have been presented to this Court, and I have heard lengthy arguments by Mr. Nand Lal on behalf of the two first-named petitioners, and by Mr. Hargopal on behalf of Ram Kishen and Punnun Lal. Before proceeding I might here note that Tota Ram, Ram Kishen and Punnun Lal have been convicted as Directors of the said Persian Gulf Trading Company, Limited, and the

27th March 1916.

Firm of "Tota Ram and Brothers," as Managers of the said Company.

It has been found as a fact, and is not denied, that the first Balance sheet of the Company should have been made out and filed with the Registrar of Joint Stock Companies on the 20th August 1913, but was not in fact submitted until the 22nd October 1913.

The grounds upon which I am asked to interfere with the convictions are that the default was not "knowingly and wilfully" authorized or permitted by the Directors, and that "Tota Ram and Brothers," though the Managing Agents of the Company, were not the Managers of the Company within the meaning and for the purposes of section 74 of the Act. It was also urged that as Tota Ram had been convicted in his personal capacity of the offence, he could not also be convicted of the same offence in his capacity as a partner of Tota Ram and Brothers.

The first point is not one upon which this Court ought to interfere on the revision side, inasmuch as the Magistrate and Sessions Judge are agreed that in point of fact and upon the evidence the petitioners have been proved to have knowingly and wilfully permitted the default. However, as the case has been argued with reference to this finding, I shall deal with the question upon the merits.

Tota Ram urges that in July 1913 he was seriously ill and that it was on this account that the default took place so far as he is concerned. As to this I agree with the Magistrate and Sessions Judge that it is not shown that this illness was such as to incapacitate Tota Ram from attending to business. On the contrary, it is proved, that though he was at times suffering from fever and "breast-ache," he was very active indeed in his business affairs, travelling from Multan to Lahore, and from Lahore to Amritsar and back again to Multan. The finding that this plea of illness is a mere pretext is amply justified and I have no hesitation in holding that Tota Ram has failed to show that he was so ill that he could not carry out his legal duties as a Director of the Company. At all events his illness did not prevent him from drawing fees and allowances from the Company.

It is next urged on his behalf (though somewhat inconsistently with his first plea) that he was very busy trying to discover a really first class accountant to whom the difficult duty of auditing the Company's accounts could be entrusted. This is palpably absurd and there is not an *iota* of evidence to

support the plea. There are numerous well qualified accountants doing business in various parts of the Province and it would have been a matter of no difficulty to find an expert auditor fully capable of auditing the very meagre accounts of this Company which, despite its grand eloquent title, did next to no business. Both excuses put forward by Tota Ram who was undoubtedly the evil genius of the Company are futile and I have no hesitation in rejecting his petition.

On behalf of Ram Kishen Mr. Hargopal argues that his client was a young and inexperienced pleader ill versed in Company Law and accounts and was to all intents and purposes a dupe of Tota Ram. To a large extent this is true, but a man, and especially a legal practitioner, who accepts the position of Chairman of the Board of Directors of a Company and in such capacity proceeds to draw fees for his services, must also accept the responsibilities attached to his office. It is true that on the 28th June 1913 Ram Kishen wrote a letter (Exhibit D—11) to Tota Ram pointing out to the latter that a balance sheet should be prepared within a year and expressing the hope that Tota Ram would not neglect to do his duty. But this very letter shows that the writer was fully aware of his legal obligations, and it was incumbent on him when he found that the time for the submission of the balance sheet was drawing near, to do something more definite than to write letters of complaint to Tota Ram, and he was bound to take such reasonable measures as he could to prevent default being made.

Admittedly, however, he did nothing until the 17th August (*i.e.*, until three days before the balance sheet should have been filed with the Registrar) when he wrote Exhibit D—12 to Tota Ram. In this letter he states that he entirely depended upon Tota Ram whom he trusted and that since receiving a letter from him, he had remained "at ease." The letter continues that the prosecution of the Bank of Peshawar had filled him with alarm and that he pities himself for having depended upon Tota Ram that he has taken upon himself to prepare the accounts but he finds it a difficult job as he is unacquainted with the facts. The writer concludes with the request that Tota Ram should come to Multan as soon as possible and that in the meantime Kirpa Ram should be asked to assist him in the preparation of accounts. No doubt by this time Ram Kishen was, as he says, filled with alarm and I see no reason to disbelieve the statement that he depended very largely upon Tota Ram.

At the same time as one of the leading Directors of the Company, it was his bounden duty to see that default was not made in the submission of the balance sheet and when he found that the time was getting short and that Tota Ram would not do his duty, he should have taken prompt measures to carry out as far as he could the provisions of the law. It was within his power to call a meeting of the Directors (see section 38 of the Act, Table A, article 66) but no attempt has been made by him to show that he did anything beyond writing to Tota Ram. It is urged on his behalf that no meeting of the Directors could validly be held in the absence of the Managing Agents and in this connection reliance is placed on articles 100 and 101 of the Articles of Association. These articles, however, do not assist Ram Kishen. Article 100 is not relevant and article 101 merely provides that if the Chairman of the Board of Directors is not present, no meeting of Directors shall be valid unless the Managing Agents are present, the obvious inference being that if the Chairman is present, the meeting is valid, whether or not the Managing Agents are also present.

I must accordingly hold that Ram Kishen was guilty of the offence, though I am quite prepared to admit that his guilt is in no way as great as that of Tota Ram. Had it been possible for me to do so I should have reduced the amount of penalty imposed upon Ram Kishen, but the section gives the Court no option in the matter and I must accordingly reject his petition.

As regards Punnun Lal it is urged that he was at Karachi attending to his duties there in connection with the Derajat Bank (a connected concern) and could not leave without Tota Ram's permission. Punnun Lal, however, has not attempted to shew that he endeavoured to get such permission and in any case if he found himself unable to attend to his duties he should have resigned his office forthwith. So far from doing so, he continued to draw his fees as a Director and was seemingly quite willing to let matters take their course. There is nothing to be said for him and his petition is also rejected.

Finally as regards Tota Ram and Brothers there remains the contention that for the purposes of section 74 of the Act that firm, though they were "Managing Agents" of the Company, were not the "Managers." I cannot accept this argument. There is no magic in the expression "Manager" as used in section 74 and I see no reason why it should not include every person or body of persons who conducts or conduct the

affairs of the Company and to whom its management, subject to the control of the Directors, is entrusted. A firm is as capable of managing a Company as an individual and if it does so, it surely can not escape liability for its misfeasance or nonfeasance merely by calling itself "Managing Agent" instead of Manager, article 111 of the Articles of Association states that the firm of Tota Ram and Brothers are appointed "Managing Agents" of the Bank; article 112 provides for their remuneration as such, and articles 113 and 114 give the Managing Agents, subject to the control of the Directors, full powers of management of the business of the Company. In these circumstances it is only reasonable to hold that Tota Ram and Brothers were the Managers of the Company for the purposes of section 74 of the Act.

The argument that Tota Ram is being punished twice for the same offence has in my opinion no force, inasmuch as it overlooks the fact that Tota Ram in his individual capacity of Director is an entirely separate and distinct personage from the firm of Tota Ram and Brothers, Managing Agents, though it may well be that the latter firm was dominated by the sinister personality of its senior partner.

For reasons given I reject this and the connected petitions for revision.

Revision rejected.

No. 19.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

THE CROWN—PETITIONER,

Versus

SUJAN SINGH AND OTHERS—(CONVICTS)—
RESPONDENTS.

Criminal Revision No. 185 of 1916.

Criminal Procedure Code, Act V of 1893, section 562—first offender—punishment—offence under Punjab Excise Act, I of 1914, section 61.

Three persons were convicted under section 61 of the Punjab Excise Act, I of 1914, for the offence of manufacturing liquor contrary to law and being in possession of it and were sentenced by the Magistrate to 4 months' rigorous imprisonment and Rs. 50 fine each. On appeal the Sessions Judge reduced the sentences to 21 days imprisonment and a fine of Rs. 20 in each case on the ground "that this is appellants' first offence, that the principles of section 562, Code of Criminal Procedure, applied and that appellants are "father and two sons."

Held, that section 562 of the Code of Criminal Procedure was intended to apply to cases where offenders (and especially youthful offenders), without

being persons of depraved character, may have succumbed to sudden temptation and the section could not properly apply to such an offence as that of manufacturing illicit liquor which implied a good deal of preparation. Also that as this offence probably escaped detection 9 times out of 10 and deprives Government of revenue, besides demoralising the people deterrent sentences are necessary, and this was also the intention of the Legislature as shown by the raising of the maximum period of imprisonment in the penal sections of the new Act as compared with the old Act.

Revision from the order of H. A. Rose, Esquire, Sessions Judge of Sialkot, dated the 30th of September 1915.

Government Advocate, for Petitioner.

B. N. Kapur, for Respondents.

The judgment of the learned Chief Judge was as follows :—

3rd April 1916.

SIR DONALD JOHNSTONE, C J.—In this case five persons namely Sujan Singh, Kharak Singh, Sher Singh, Pala Singh and Bulaqi, were placed before a 1st class Magistrate, Sialkot, charged under section 61 of the Excise Act of 1914 with manufacturing liquor contrary to law and being in possession of it. Of these persons Pala Singh and Bulaqi were acquitted and the other three were convicted and sentenced to four months' rigorous imprisonment each and a fine of Rs. 50 each. These three persons appealed, and the learned Sessions Judge, while holding that the convictions of the accused were certainly correct, inasmuch as the appellants' conduct, was in the circumstances most "convincing evidence of their guilt," yet considered that the sentences were excessive and reduced them to 21 days' imprisonment and a fine of Rs. 20 in each case. The reasons given for this reduction of sentences are that this is appellants' first offence, that the principle of section 562, Criminal Procedure Code, applied and that the appellants are father and two sons.

The Government have applied to this Court on the revision side for enhancement of the sentences and, after hearing arguments, it seems to me quite clear that the sentences are wholly inadequate. The accused persons were represented in this Court, and their learned counsel not only argued against enhancement of sentence but also tried to make out that there was doubt about the guilt of the accused.

After hearing what he had to say, I have formed the opinion that, as regards the guilt of the accused, there is no doubt whatever. The evidence for the prosecution is largely that of important officials of unimpeachable veracity, and their evidence was quite sufficient to prove the case, even if the testimony of the boy Budhu, and of Mangal Singh and Rur

Singh witnesses is brushed aside. Both the lower Courts have been very careful in their estimate of the evidence for the prosecution, rejecting the statements of Mangal Singh and Rur Singh, which may after all be perfectly true, and in the case of the Lower Appellate Court, rejecting also the statement of the boy Budhu, which in my opinion is almost certainly true. However this may be, I am quite certain that the accused did manufacture spirit contrary to law and were in possession of spirit contrary to law.

The reasons given by the learned Sessions Judge for reducing the sentences seem to me wholly inadequate. I fancy the idea of the Legislature in framing section 562 of the Criminal Procedure Code was that sometimes offenders (and in especial youthful offenders), without being persons of depraved character, may on occasion succumb to sudden temptation; for example, a poor youth without an anna in his pocket sees suddenly displayed before him some property which is worth his stealing. He, having never previously committed any crime whatever, succumbs to temptation and steals the property, and is caught. The legislature very humanely and very properly allows the Magistrate in such a case as that to give the young man another chance and to deal with him under section 562.

But the offence of manufacturing illicit liquor stands on quite a different footing from all that sort of thing. It implies a good deal of preparation. In most cases it is done with the intention of selling to others. It can never be said that it is done in consequence of succumbing to sudden temptation. Further, it is an offence which probably escapes detection 9 times out of 10, and it deprives Government of revenue, besides demoralising the people. Deterrent sentences in such circumstances are absolutely necessary. The profits of illicit distillation are so large that an offender would cheerfully pay a fine like Rs. 20 and still continue his evil courses. Lastly, it may be taken for granted in almost every case that, when a man is found by the police manufacturing illicit liquor, he has probably done it at least a dozen times before undetected so that the principle of "first offence" has no application to such cases at all.

Further, the Legislature, in passing the new Excise Act of 1914, evidently realised that the old law was not sufficiently deterrent. Under the old Act (see section 51) only three months' rigorous imprisonment could be inflicted for possession of illicit liquor, but under section 61 of the present Act the maximum imprisonment has been raised to one year, and

under section 74 of the present Act an enhanced maximum is provided for second offences of the same kind. All this seems to me to shew that it is the duty of the Court to inflict substantial sentences in these cases. In my opinion the view that is sometimes expressed that, because an excise offence is a *malum prohibitum* and not a *malum in se*, the culprit should be mortified in pocket rather than in person, is wholly incorrect. In 9 cases out of 10 excise offences are committed with the intention of making money, and the nefarious trade is usually very lucrative. In my opinion the Legislature intended that substantial terms of imprisonment should be awarded in these cases. In the present instance, even the sentence passed by the first Court seems to me to have been, if anything too light, but in the circumstances in which the present case comes before me I am not disposed to go beyond it.

I allow this revision and restore the sentences passed by the first Court. The three accused persons will therefore be re-arrested and will have to suffer on the whole four months' rigorous imprisonment and pay a fine each of Rs. 50, or in default suffer $1\frac{1}{2}$ months' more rigorous imprisonment.

Revision allowed.

No. 20.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

THE CROWN—APPELLANT,

Versus

FAIZ AND OTHERS—(CONVICTS)—RESPONDENTS.

Criminal Appeal No. 922 of 1915.

Indian Evidence Act, I of 1872, sections 32 (1) and 32, illustration (a)—admissibility of statement of deceased, who committed suicide owing to ill-treatment by accused, charged under section 330 of the Penal Code.

The accused were charged under section 330 of the Penal Code with having, for the purpose of extorting a confession, caused hurt to one R. who committed suicide in consequence of the ill-treatment. The question was whether a statement made by R. as to the cause of his wounding himself with a razor (which caused his death) was admissible in evidence in the case, the accused not being charged with having caused the death of R.

Held, that as there was no doubt that the suicide of R. was the result of the ill-treatment by the accused, that treatment was the cause, though not the direct cause, of the death and although the accused were not legally responsible for the suicide the cause of death came into question in this case, the whole affair, ill-treatment and subsequent suicide, being all one transaction and consequently the statement of the deceased was admissible under section 32 (1) of the Evidence Act.

The difference between English law and the law in India referred to.

17 P. R. (Cr.) 1901 (1) and I. L. R. 25 Bom. 45 (2), distinguished.

Appeal from the order of H. A. Rose, Esquire, Sessions Judge of Sialkot, dated the 29th of May 1915.

Assistant Legal Remembrancer, for Appellant.

Dhan Raj Shah, for Respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—Faiz, Muhammad Din and Khuda Bakhsh 3rd April 1916.
were tried by the District Magistrate and convicted of an offence under section 330, Indian Penal Code, and sentenced each to three months' simple imprisonment and fine of Rs. 100 or in default six months' rigorous imprisonment. The learned Sessions Judge on appeal altered the conviction to one under section 323, and reduced the sentence to the fine or imprisonment in default. This being in effect an acquittal of the charge under section 330, Government has preferred an appeal.

The facts are fully given in the judgments of the lower Courts and it is unnecessary to repeat them. Both the lower

(1) 17 P. R. (Cr.) 1901 (*Fakir v. Emperor*).

(2) (1900) I. L. R. 25 Bom. 45, (*Imperatrix v. Rudra*).

Courts have held it proved that the convicts ill-treated the deceased Rahmat, but the learned Sessions Judge holds that there is no proof that the object was to extort a confession and that the probabilities are that he was merely beaten as he was suspected of being a thief, and so the Sessions Judge holds that the conviction under section 330 cannot be upheld.

On behalf of the convicts it is urged that the statements made by the deceased are inadmissible in evidence and that there is no good proof that the convicts beat the deceased. For the prosecution it is urged that the statements are admissible under section 32 (1), Evidence Act. Mr. Dhan Raj Shah objects that his clients have not been tried for causing the death of Rahmat, and that the cause of that death is not in question, death being admittedly the result of Rahmat's wounding himself with a razor. Counsel for the convicts quotes 17 *P. R.* 1901 (1) and 25 *Bom.* page 45 (2). In the former case the head-note seems to go further than the judgment. The Bombay case is easily distinguishable. There the appellant had been tried for dacoity, the deponent had died of pneumonia, and no connection between the dacoity and pneumonia was proved. In the present case there can, we think, be no doubt that the suicide was the result of the ill-treatment received at the hands of the convicts, and so that treatment was the cause though not the direct cause of the death, and though the convicts are not legally responsible for the suicide the cause of death comes into question in this case, the whole affair, ill-treatment and subsequently suicide, being all one transaction. Illustration (a) to section 32 seems also in point, as shewing that a statement as to the cause of death referring to the rape is relevant as against a person tried for the rape when rape and death form parts of the same transaction. The difference between English law and the law in India is pointed out on page 302 of Woodroffe and Amis Ali's *Law of Evidence*, 6th edition.

We hold that the statements are admissible. Taking these statements into consideration we have no hesitation in agreeing with the lower Courts in their finding that the respondents to this appeal ill-treated and caused hurt to Rahmat.

We cannot agree with the learned Sessions Judge that Rahmat was beaten merely out of resentment as being suspected of being a thief. Police aid had been invoked and everything in our opinion points to an attempt on the part

(1) 17 *P. R. (Cr.)* 1901 (*Fakir v. Emperor*).

(2) (1900) *I. L. R.* 25 *Bom.* 45 (*Imperatrix v. Rudra*).

of the respondents to make Rahmat confess and give up the stolen property. When a thief is caught *in flagrante delicto* he is often given a good beating in the passion of the moment, but here the circumstances are entirely different, Rahmat was merely a suspect against whom evidence was not forthcoming though wanted.

We accept this appeal and restore the conviction under section 330 and the sentence passed by the District Magistrate. We further direct that the fines, if realized, shall be paid to the nearest representative of the deceased.

We note that the sentence passed by the District Magistrate is certainly not excessive, but errs, if at all, on the side of leniency. The respondents should surrender to the District Magistrate or to the Superintendent of the Jail within one week to undergo the sentence; failing this the District Magistrate should cause them to be arrested.

Appeal accepted.

No. 21.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Scott-Smith.

BUDHA—(CONVICT)—APPELLANT,

Versus

THE CROWN—RESPONDENT,

Criminal Appeal No. 204 of 1916.

Indian Penal Code, sections 442, 443, 451 and 453—house-trespass—lurking house-trespass.

The appellant was caught at night in the courtyard of complainant's *hareli* under circumstances which shewed that he had come there in order to commit theft of cattle. Appellant had entered the courtyard through the *deorhi* which had no door attached to it and therefore there was no house breaking.

Held, that in order to constitute *lurking* house trespass, the offender must take some active means to conceal his presence and as there was no proof of this in the present case the appellant was not guilty of the offence of *lurking* house-trespass but was punishable under section 451, part II of the Penal Code.

16 P. R. (Cr.) 1889 (1), referred to.

Appeal from the order of Major J. Frizelle, Sessions Judge, Lahore, dated the 18th February 1916.

Nemo, for Appellant.

Mul Chand, for Respondent.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—Budha, a Kumhar by caste, has been *4th May 1916.* convicted by the Sessions Judge, Lahore, of lurking house-

trespass by night under section 457, Indian Penal Code, and as he has been convicted four times previously of offences under Chapter XVII, Indian Penal Code, has been sentenced to transportation for life. He has appealed to this Court through the Superintendent of Jail and we have carefully considered the evidence against him.

In our opinion it is clearly proved that the appellant was caught at night in the courtyard of Jowand Singh's *haveli* under circumstances which showed that he had come there in order to commit theft of cattle. Jowand Singh and Baj Singh (P. Ws. 2 and 3) were sleeping in the *haveli* on the night in question and caught the appellant red-handed. We see no reason whatever to reject their evidence. The evidence of Tilok Singh (P. W. 5) is also important as shewing that appellant knew that there were cattle in the *haveli* in question. Appellant's allegation that he was Jowand Singh's servant and was falsely accused of the offence because he had demanded the pay which was due to him is not supported by any evidence. On the contrary from the prosecution evidence it is clear that he was a stranger in Jowand Singh's village and had never been seen there before. The assessors were unanimously of opinion that he was guilty and we agree with them and the Sessions Judge.

At the same time we do not think that the offence committed was one of *lurking* house trespass by night. It was certainly one of house trespass, for the appellant had entered the courtyard of the *haveli* through the *deorhi*, but the *deorhi* itself had no door attached to it and therefore there was no house-breaking. House-trespass becomes lurking house-trespass if the offender takes precautions to conceal such house-trespass from some person who has a right to exclude him. We do not think it can be said that the mere fact that a house-trespass was committed by night makes the offence one of *lurking* house-trespass. In order to constitute lurking house-trespass we are of opinion that the offender must take some active means to conceal his presence as in the case reported as No. 16 P. R. 1889 (1), where it was held that hiding in a corner of the porch was within the definition. We therefore alter the conviction to one under section 451, Part II, Indian Penal Code, but having regard to appellant's previous record we see no reason to interfere with the sentence and we dismiss the appeal.

Appeal dismissed.

No. 22.

Before Hon. Mr. Justice Shah Din.

TARA CHAND AND OTHERS—PETITIONERS,

Versus

BEHARI LAL AND OTHERS—RESPONDENTS.

Criminal Revision No. 516 of 1916.

Criminal Procedure Code, Act V of 1893, section 145—order made without regard to provisions of section and without recording evidence.

The Magistrate passed an order under section 145 of the Code of Criminal Procedure against the petitioner without making any order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the wall in question and requiring the parties concerned to attend his Court and put in written statements &c. and without recording the statements of petitioner's witnesses.

Held, that the Magistrate had wholly disregarded the positive provisions of section 145 and the order was *ultra vires* and must be set aside.

68 P. L. R. 1914 (1) and 4 P. R. (Cr.) 1916 (2), referred to.

Revision from the order of W. C. Gow, Esquire, Magistrate, 1st class, Ambala, dated the 6th December 1915.

Beechey and Gokal Chand Narang, for Petitioners.

Jhanda Singh, for Respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—This is a petition for revision of an order 12th May 1916. passed by the Magistrate, 1st class, Ambala, under section 145, Criminal Procedure Code. The principal ground upon which revision is sought is that the Magistrate has shown an utter disregard of the imperative provisions of sub-sections (1), (3) and (4) of section 145 of the Code, and that therefore the order passed by him was one without jurisdiction.

A reference to the record shews that the Magistrate made no order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the wall in question and requiring the parties concerned in such dispute to attend his Court and to put in written statements of their respective claims as respects the fact of actual possession of the wall. As the Magistrate omitted to make the order required by sub-section (1) of section 145, of course no copy of the order was served upon any of the parties, nor was a written copy published as required by sub-section (3) of the section. But this was not all. When the petitioners appeared in the Magistrate's Court,

(1) 68 P. L. R. 1914 (*Muhammad Sharif v. Lala Dhanpat Rai*).

(2) 4 P. R. (Cr.) 1916 (*Fatch Sher Khan v. Crown*).

they made an application to him on the 29th of October 1915 to summon four witnesses for them and to take their evidence; the necessary summonses were issued, but the evidence of the witnesses was not taken by the Magistrate at all. Another application to the same effect was presented by the petitioners on the 1st of December 1915, but no action was taken thereon by the Magistrate.

It has been contended by the respondent's pleader that the omission on the part of the Magistrate to comply with the requirements of sub-sections (1) and (3) of section 145 was a mere irregularity which did not affect the Magistrate's jurisdiction, and in this connection No. 68 P. L. R. 1914 (1) is relied upon. But granting the soundness of this contention, it is clear to my mind that the Magistrate was bound to record the evidence of the petitioners as required by sub section (4) of section 145, and that he had no jurisdiction to pass the order that he has passed in this case without recording such evidence. I agree in the principle laid down in No. 4 P. R. 1916 (Cr) (2).

It is clear from the record that the Magistrate has wholly disregarded the positive provisions of section 145 of the Criminal Procedure Code; and in my opinion the order passed by him was *ultra vires*. I accordingly set aside his order.

Revision accepted.

No. 23.

Before Hon. Mr. Justice Broadway.

MAULA BAKHSH—PETITIONER,

Versus

LAL CHAND—RESPONDENT.

Criminal Revision No. 609 of 1916.

Criminal Procedure Code, V of 1898, sections 195, 439 and 537—power of Chief Court to pass orders as appear necessary, even when petitioner failed within time to appeal from order sanctioning his prosecution—sanction granted by the successor of the Munsiff before whom the alleged offence was committed and without notice to accused.

Held, that under section 439 of the Code of Criminal Procedure the Chief Court has power to examine the record and pass such orders as may be necessary, notwithstanding that the accused petitioner failed to appeal within time from the order sanctioning his prosecution.

Held also, that in cases like the present before giving sanction to prosecute under section 195, notice should invariably be issued to the party concerned.

(1) 68 P. L. R. 1914 (*Muhammad Sharif v. Lala Dhanpat Rai*).

(2) 4 P. R. (Cr.) 1916 (*Fateh Sher Khan v. Crown*).

Held further, that there is no Court of a Munsiff of the 1st class as a permanent Court with a perpetual succession of Judges and that on transfer of a Munsiff from a district, the Court of the Munsiff who takes over the pending work is not identical with the Court of the Munsiff who has been transferred and consequently the sanction granted in this case by the successor of a Munsiff was without jurisdiction and must be set aside, as the trial had not concluded.

25 P. R. (Cr.) 1889 (1), 30 P. R. (Cr.) 1901 (2), 7 P. R. (Cr.) 1902 (3), 6 P. R. (Cr.) 1909 (4) and 7 P. R. (Cr.) 1913 (5), referred to.

I. L. R. 29 Mad. 331 (6), I. L. R. 32 Bom. 184 (7), I. L. R. 37 Cal. 642 (F. B.) (8), I. L. R. 39 Cal. 463 (466) (9) and 29 P. R. (Cr.) 1879 (10), distinguished.

Held also, that such an illegality was probably not cured by section 537 of the Code.

I. L. R. 25 Mad. 61 (P. C.) (11), referred to.

Case reported by Khan Bahadur Maulvi Inam Ali, B. A., District and Sessions Judge, Nissar, with his No. 230 J. of 27th March 1916.

Rup Ram, for Petitioner.

Tek Chand, for Respondent.

The facts of this case are as follows :—

There was a civil dispute between Lal Chand, plaintiff, and Maula Bakhsh, defendant, about a wall in the Court of Mr. Marsden, Munsif, 1st class, Palwal. In this case Maula Bakhsh made a statement on 18th August 1914 as defendant regarding this wall. The statement does not appear to be clearly recorded, so far as the disputed wall was concerned. The defendant also stated that when plaintiff bought from Buta Khan there were two *chappars*. In the same case on 8th December 1914 before Mr. Spence, Munsif, 1st class, Palwal, Maula Bakhsh as a witness of the plaintiff stated that when Buta Khan owned the plaintiff's house it was inhabited by Kalu, son of Mangtu, in one *chappar* and Alim Ullah in the other. Buta Khan lived in a *chappar* outside. There are three *chappars* in all. This case was decided by Mr. Spence on 17th December 1914. There was an appeal made by Maula Bakhsh defendant. The appeal is said to be still

- (1) 25 P. R. (Cr.) 1889 (*Phina Singh v. The Empress*).
- (2) 30 P. R. (Cr.) 1901 (*Sobha Singh v. Lal Chand*).
- (3) 7 P. R. (Cr.) 1902 (*Mela Ram v. The Emperor*).
- (4) 6 P. R. (Cr.) 1909 (*Crown v. Mussammal Dauli*).
- (5) 7 P. R. (Cr.) 1913 (*Muhammad Ishaq v. Muqim-ud-Din*).
- (6) (1905) I. L. R. 29 Ma t. 331 (*Runga Ayyar v. The Emperor*).
- (7) (1907) I. L. R. 32 Bom. 184 (*In re Lakhshmidas Lalji*).
- (8) (1910) I. L. R. 37 Cal. 642 (F. B.) (*Bahadur v. Eradatullah Mallick*).
- (9) (1911) I. L. R. 39 Cal. 463 (466) (*Rati Jha v. The Emperor*).
- (10) 29 P. R. (Cr.) 1879 (*Karim Bakhsh v. Mul Chand*).
- (11) (1901) I. L. R. 25 Mad. 61 (P. C.) (*Subrahmanya Ayyar v. King-Empress*).

pending before the Additional District Judge sitting at Karnal. On 13th May 1915 Lal Chand appears to have applied to the Sub-Divisional Officer Palwal (then Mr. Raghbir Singh) for sanction to his prosecuting Maula Bakhsh on the alleged discrepancies in his statements as a defendant and subsequently as a witness of the plaintiff. It is admitted that as a witness of the plaintiff his statement was true.

Lal Chand, plaintiff was by order, dated 11th June 1915, granted sanction by Kanwar Raghbir Singh, Sub-Divisional Officer, Palwal, under section 195, Criminal Procedure Code, to prosecute Maula Bakhsh under section 193, Indian Penal Code.

The proceedings are forwarded for revision on the following grounds :--

Mr. Raghbir Singh thought that as successor of Messrs. Marsden and Spence he could give the sanction and gave to Lal Chand sanction to prosecute Maula Bakhsh signing the order of sanction dated 11th June 1915 in his capacity of Magistrate, 1st class. He passed this order without hearing Maula Bakhsh. Lal Chand lodged a complaint on the basis of this sanction on 17th November 1915 in the Court of Lala Prabhu Dayal, Magistrate, 1st class, Gurgaon. Maula Bakhsh applied to that Court on 11th January 1916 bringing to the notice of the said Court the illegality of the order of sanction passed against him without giving him any notice and without hearing him, and he was directed to seek his remedy by appeal if advised. After this Maula Bakhsh petitioned to this Court on 4th March 1916. Appellant's petition as an appeal is time-barred but the illegalities committed are so material and the order of sanction so carelessly given by the lower Court which had no jurisdiction whatever to give such sanction that I consider it a fit case for submission to the Chief Court with a recommendation that the order be set aside.

First Mr. Raghbir Singh as successor of Messrs. Marsden and Spence had no jurisdiction to grant the sanction. He should have sent up the petition for sanction to the Appellate Court.

Second the first statement of Maula Bakhsh was as a defendant and regarding the subject matter of the suit and was itself not a clearly recorded one. There was no second contradictory statement on the subject of the ownership of the wall. It was in this first statement only that questions were put about the wall, and the defendant corrected himself in this very statement. The second statement of Maula Bakhsh was as a

witness of the plaintiff and it is said in this subsequent statement he gave correct answers about the *chappars*.

I cannot understand how did the lower Court give sanction to Lal Chand to prosecute the petitioner, under the circumstances above mentioned, without hearing what he had to say against it.

The order of the Chief Court was delivered by—

BROADWAY, J.—Mr. Tek Chand on behalf of Lal Chand *20th May 1916.*
raised a preliminary point that no revision lay in this matter for the following reasons:—

- (i) sanction to prosecute was granted on 11th June 1915.
- (ii) complaint was filed by Lal Chand on 17th November 1915;
- (iii) the first hearing of the case was on 26th November 1915;

and that on that date the petitioner became aware of the existence of the sanction.

In spite of this knowledge however the case proceeded and witnesses for the prosecution were examined on the 11th January 1916 on which date all that petitioner did was to object to the legality of the sanction, and that it was not till the 4th March 1916 that he took any steps to have the sanction set aside. He contended that inasmuch as an appeal lies from an order granting sanction under section 195, Criminal Procedure Code, it was the duty of the petitioner to file such an appeal. He further contended that article 154 of the Indian Limitation Act 1908 was applicable and that by making use of section 5 of that Act the petitioner could have filed an appeal on becoming aware of the existence of the sanction on the 26th November 1915, and that as the petitioner did not take any steps to get the sanction set aside till the 4th March 1916 this Court should not consider the revision at all.

I am however unable to accede to the contention. I consider that section 439, Criminal Procedure Code, gives this Court full power to examine the record and to pass such orders as may be necessary.

No doubt when there has been inordinate delay in moving the Court it would not be considered necessary or advisable to take any action under section 439, Criminal Procedure Code, but in this case the circumstances are such that I consider it necessary to examine the record of the proceedings in order to ascertain how far the sanction accorded on the 11th June 1915 is legal.

As pointed out in the order of reference these proceedings have arisen out of Civil litigation between the parties.

This Civil litigation was commenced before Mr. Marsden, as Munsif, 1st class, at Palwal and before him Maula Bakhsh, on the 18th August 1914, made a statement as defendant.

Mr. Marsden was transferred and Mr. Spence succeeded him as Munsif, 1st class, at Palwal. Before him Maula Bakhsh, on the 8th December 1914, made a statement as a witness produced by the plaintiff. The suit was decided by Mr. Spence on the 17th December 1914, and an appeal is, I understand, pending against his decision.

In his turn Mr. Spence was transferred and was succeeded by Mr. Raghbir Singh as Munsif, 1st class, at Palwal. It was before this officer that Lal Chaud filed an application under section 195, Criminal Procedure Code, praying for sanction to prosecute Maula Bakhsh under section 193, Indian Penal Code, in respect of the two statements above referred to.

Mr. Raghbir Singh without issuing notice to Maula Bakhsh granted the sanction prayed for on the 11th June 1915.

Mr. Rup Ram for Maula Bakhsh has attacked this sanction on various grounds. He complains that notice was not given to his client before sanction was granted. The Code does not provide for the issue of such a notice and therefore a sanction granted without notice is not illegal. It has however been repeatedly held that it is usual and advisable to give notice—and in cases like the present I am of opinion that notice should invariably issue, although on this ground alone I would not be inclined to interfere under section 433, Criminal Procedure Code. It is next argued (1) that Mr. Raghbir Singh granted sanction as a Magistrate, 1st class, whereas the offence, (if any) was committed in a Civil Court; and (2) that there being no Court of a Munsif, 1st class, with a perpetual succession of Judges Mr. Raghbir Singh had no jurisdiction to grant the sanction, the offence (if any) not having been committed before him.

As to (1) I am of opinion that a mere misdescription, such as this, would be no ground for holding a sanction to be bad in law.

Mr. Raghbir Singh was at Palwal in a dual capacity, he was a Munsif, 1st class, as well as a Magistrate, 1st class, and his erroneously describing himself as a "Magistrate" when he should have written "Munsif" would not vitiate the

sanction accorded. In any event I consider that section 537, Criminal Procedure Code, would clearly cover such a misdescription.

The second contention however is on a totally different footing, and is one of the main points taken by the learned Sessions Judge in his order of reference.

It was held in *Phina Singh v. The Empress* [25 P. R. 1889, Cr. (1)] by Plowden, J. that "there is no Court of a Magistrate of the 1st class as a permanent Court with a perpetual succession of Judges"—and that therefore a Magistrate before whom the offence had not been committed could not grant sanction to prosecute under section 195, Criminal Procedure Code, merely because he succeeded a Magistrate in that particular place or District.

This case was followed by Reid, J. in *Sobba Singh v. Lal Chand* [30 P. R. 1901, Cr. (2)] and on this point *Sobba Singh v. Lal Chand* was not differed from in *Mela Ram v. The Emperor of India* [7 P. R. 1902 (3)].

In the *Crown v. Mussammatt Dauli* [6 P. R. 1909 Cr. (4)] *Phina Singh v. The Empress* was referred to with approval by a Division Bench of this Court, and finally Beadon, J. followed *Phina Singh v. The Empress* in *Muhammad Ishaq v. Muqim ud-Din* [7 P. R. 1913] (5) and held that there was no Court of a Subordinate Judge as a permanent Court having a perpetual succession of Judges.

Mr. Tek Chand urges that this last decision is bad law and apparently section 18 of the Punjab Courts Act, 1914 was lost sight of. He also has referred me to 29 M. 331 (6), 32 B. 184 (7), 37 C. 642 F. B. (8), 39 C. 463 (at p. 466) (9) and 5 A. L. J. 17, and on the ground that other High Courts in India have taken a different view on this point of law, has invited me to refer this case to a Division Bench.

I see no reason for thinking that the learned Judge who was responsible for the decision in *Muhammad Ishaq v. Muqim-ud-Din* [7 P. R. 1913, Cr. (5)] overlooked the provisions of the Punjab Courts Act then in force and as I

(1) 25 P. R. (Cr.) 1889 (*Phina Singh v. The Empress*).

(2) 30 P. R. (Cr.) 1901 (*Sobba Singh v. Lal Chand*).

(3) 7 P. R. (Cr.) 1902 (*Mela Ram v. The Emperor*).

(4) 6 P. R. (Cr.) 1909 (*Crown v. Mussammatt Dauli*).

(5) 7 P. R. (Cr.) 1913 (*Muhammad Ishaq v. Muqim-ud-Din*).

(6) (1905) I. L. R. 29 Mad. 331 (*Runga Ayyar v. The Emperor*).

(7) (1907) I. L. R. 32 Bom. 181 (*In re Lakshmidas Lalji*).

(8) (1910) I. L. R. 37 Cal. 642 (P. B.) (*Bahadur v. Eradatullah Mallick*).

(9) (1911) I. L. R. 39 Cal. 463 (466) (*Rati Jha v. The Emperor*).

hold the same view of the law I see no reason for making the reference asked for.

Referring to the cases cited by Mr. Tek Chand I find that *Runga Ayyar v. Emperor* [29 M. 331 (1)] was dissented from in *The Crown v. Mussammat Dauli* [6 P. R. 1909 Cr. (2)] by a Division Bench of this Court; and *In re Lakshmi Das Lalji* (32 B. 184) (3) has no bearing on the point under consideration.

No doubt *Bahadur v. Eradatullah Mallick* [37 C. 642 (4)] is to some extent in point as also is *Rati Jha v. Emperor* [39 Cal. 463 at p. 466 (5)] but the former case dealt more particularly with the provisions of section 476, Criminal Procedure Code, and the latter treats the matter as concluded and gives no reason for the decision arrived at. In these circumstances I can see no reason for taking a different view on this question to that taken by this Court consistently since 1889.

I have also had my attention drawn to *Karim Bakhsh, etc., v. Mul Chand* [29 P. R. 1879, Cr. (6)] but I cannot see that that case is to the point—probably in those times there was a Court of the Judicial Assistant and the Madras decision relied on in that case seems to have been discussed and distinguished by Plowden, J. in *Phina Singh v. The Empress* [25 P. R. 1889, Cr. (7)].

I have been unable to find the ruling cited as 5 A. L. J. 17. No doubt section 18 of the Punjab Courts Act, 1914, establishes certain classes of Courts among which are (a) the Court of the Subordinate Judge and (b) the Court of the Munsif. In precisely the same way section 6 of the Criminal Procedure Code, 1908 provides for the establishing of certain classes of Courts among which is to be found the Court of “Magistrate of the 1st class.” As was held in *Phina Singh v. Empress* [25 P. R. 1889 (6)] with regard to the Courts of Magistrates and in *Muhammad Ishaq v. Muqim-ud-Din* [7 P. R. 1913, Cr. (8)] with regard to the Courts of Subordinate Judges I hold that there is no Court of a Munsif of the 1st class as a permanent Court with a perpetual succession of Judges, and that on the transfer of a Munsif from a

(1) (1905) I. L. (1905) I. L. R. 29 Mad. 331 (*Runga Ayyar v. The Emperor*).

(2) 6 P. R. (Cr.) 1909 (*Crown v. Mussammat Dauli*).

(3) (1907) I. L. R. 32 Bom. 184 (*In re Lakshmidas Lalji*).

(4) (1910) I. L. R. 37 Cal. 642 (F. B.) (*Bahadur v. Eradatullah Mallick*).

(5) (1911) I. L. R. 39 Cal. 463 (466) (F. B.) (*Rati Jha v. Emperor*).

(6) 29 P. R. (Cr.) 1879 (*Karim Bakhsh v. Mul Chand*).

(7) 25 P. R. (Cr.) 1889 (*Phina Singh v. The Empress*).

(8) 7 P. R. (Cr.) 1913 (*Muhammad Ishaq v. Muqim-ud-Din*).

District, the Court of the Munsif who takes over the pending work is not identical with the Court of the Munsif who has been transferred. It follows therefore that in the present case Mr. Raghbir Singh was acting beyond his jurisdiction when he granted the sanction under consideration.

Whether or not this illegality (or irregularity as Mr. Tek Chand would call it) could be cured by section 537, Criminal Procedure Code, is doubtful and as at present, advised I do not think it could [*Subrahmania Ayyar v. King-Emperor* (25 M. 61 P. C.) (1)], but I do not see how I can ignore this illegality when it has been brought to my notice before the trial has concluded.

I accordingly set aside the sanction granted by Mr. Raghbir Singh on the 11th June 1915 and quash the proceedings that have been commenced under it.

Revision accepted.

No. 24.

Before Hon. Mr. Justice Chevis.

SADR-UD-DIN—PETITIONER,

Versus

MUSSAMMAT MUSAHIB KHANAM—RESPONDENT.

Criminal Revision No. 193 of 1916.

Criminal Procedure Code, Act V of 1898, section 488—Application for maintenance after a similar application on same allegations has been rejected as not proved.

The wife of one S. applied in 1914 for maintenance, alleging cruelty for not living with her husband. Her application was dismissed on the ground that she had failed to prove the alleged cruelty, subsequently she presented a fresh application, again alleging the same cruelty, which was tried by another Magistrate, who found that cruelty had been proved and granted her prayer for maintenance.

Held, following I. L. R. 5 All. 224 (2) that no second enquiry into the same allegation, which had once already been enquired into and adjudicated on by a competent Court, was competent and that the order of the Magistrate granting maintenance must accordingly be set aside.

1 Cal. L. R. 89 (3), distinguished.

9 Cr. L. J. 21 (4), disapproved.

(1) (1901) I. L. R. 25 Mad. 61 (P. C.) (*Su'rahmania Ayyar v. King-Emperor*).

(2) (1882) I. L. R. 5 All. 224 (*Laraiti v. Ramdial*).

(3) (1877) 1 Cal. L. R. 89 (*Mussammat Jamoti v. Gadalo Kamar*).

(4) (1908) 9 Cr. L. J. 21 (*Poso v. Ma Kyin Me*).

Revision from the order of C. L. Dundas, Esquire, Sessions Judge, Delhi, dated the 27th December 1915.

Badr-ud-din Kureshi, for Petitioner.

Ahmad Hussain, for Respondent.

The judgment of the learned Judge was as follows :—

14th April 1916.

CHEVIS, J.—Mussammatt Musahib Khanam is the wife of Sadr-ud-din. She applied under section 488, Criminal Procedure Code for maintenance in 1914, alleging cruelty as an excuse for not living with her husband. Her application was dismissed by Mr. McNabb on 10th August 1914 on the ground that she had failed to prove the alleged cruelty.

She has now brought a fresh application, which has been heard by *Shafaul Mulk* Razi-ud-din Khan, Honorary Magistrate. The Honorary Magistrate holds the allegations of cruelty to be proved and has ordered the husband to pay Rs. 15 per mensem maintenance

The Honorary Magistrate quotes section 488 (8), Criminal Procedure Code, as authority for enabling him to take up the case in spite of the previous decision, though as the sub-clause quoted refers only to costs this is no authority whatever.

I note first that since the decision of the former application the woman has not been living with her husband, so there is no case of subsequent cruelty. It is the same allegation of cruelty in the past. This allegation has once been held by a competent Magistrate to be not proved, and if the woman is to be allowed to revive the same charge there seems to be no finality whatever in such matters. If she can revive it once she can revive it a dozen times. A dozen Magistrates might in succession hold cruelty not proved and she might still bring a fresh application.

Counsel for the husband quotes 1 Calcutta Law Reports, page 89 (1) and 5 All. 224 (2). The former is not quite in point but the latter is. The wife's counsel relies on 9 Criminal Law Journal 21 (3), which disapproves of 5 All. 224 (2). Both the conflicting rulings are judgments of a Judge sitting alone. I have no hesitation in following the Allahabad ruling. To do otherwise would mean that, as I have already pointed out, there would be no finality of decision in such cases. When one Magistrate has fully enquired into and adjudicated on a certain charge, and a second Magistrate then holds a

(1) (1877) 1 Cal. L. R. 89 (*Mussammatt Jamoti v. Gadalo Kamar*).

(2) (1882) 1 L. R. 5 All. 224 (*Laraiti v. Ramdial*).

(3) (1908) 9 Cr. L. J. 21 (*Poso v. Ma Kyin Me*).

further enquiry into the same charge the effect is in practice much the same as if the second Magistrate exercised the rights of an Appellate Court, though of course there is this difference that the parties produce evidence *de novo*.

I follow the Allahabad ruling and hold that no second enquiry into the same allegations, which have once already been enquiry into and adjudicated on by a competent Court, is competent. Had there been charges of cruelty subsequent to the former decision the case would of course have been different.

I accept this application and set aside the Magistrate's order ordering the husband to pay maintenance.

Revision accepted.

No. 25.

Before Hon. Mr. Justice Broadway.

OFFICIAL RECEIVER, KARACHI—PETITIONER,

Versus

GANGA RAM-SHANKAR DAS AND OTHERS,—
RESPONDENTS.

Criminal Revision No. 477 of 1916.

Criminal Procedure Code, Act V of 1898, section 369—review of judgment by a Sessions Court—whether competent.

Held, that a Sessions Court is not competent to review its judgment, *vide* section 369 of the Code of Criminal Procedure.

8 P. R. (Cr.) 1909 (1), *I. L. R.* 35 Cal. 350 (2), *I. L. R.* 22 Bom. 949 (3), 30 *Indian Cases* 136 (4), *I. L. R.* 38 All. 134 (5) and 21 *Indian Cases* 447 (6), referred to.

2 P. W. R. 1910 (Cr.) (7), distinguished.

Revision from the order of A. H. Brasher, Esquire, Sessions Judge, Lyallpur, dated the 17th May 1915.

Nanak Chand, for Petitioner.

Sheo Narain, for Respondents.

The judgment of the learned Judge was as follows:—

BROADWAY, J.—The facts of this case are as follows. One Mangnan Mal was a member of the firm carrying on business under the name of Rejoo Mal-Topan Das. This firm traded at Kasur, Jaranwala, Nankana Sahib, Karachi and other

15th May 1916.

(1) 8 P. R. (Cr.) 1909 (*Hira v. King-Emperor*).

(2) (1908) *I. L. R.* 35 Cal. 350 (*Parbati Charan v. Sajjad Ahmad*).

(3) (1897) *I. L. R.* 22 Bom. 949 (*In re Harilal Buch*).

(4) (1915) 30 *Indian Cases* 136 (*Narasinga Rao v. Vittoba Rao*).

(5) (1915) *I. L. R.* 38 All. 134 (*Emperor v. Gobind Sahai*).

(6) (1913) 21 *Indian Cases* 117 (*Ram Dulare v. Ajudha Singh*).

(7) 2 P. W. R. 1910 (Cr.) (*In re Malak Umar Hayat Khan*).

places, its head office being at Kasur. The firm dealt in cotton and grain purchased in the various Punjab *Mandis* and apparently despatched to Karachi. It was declared insolvent on the 12th June 1913 in Karachi and the Official Receiver, Karachi, took over all available assets. On the 27th of May 1913 certain traders at Jaranwala and Nankana Sahib filed complaints against members of this firm under section 420, Indian Penal Code. The complaints filed by the traders at Jaranwala were made over to the police for investigation and chalan by Risaldar Sardar Bahadur Partab Singh, an Honorary Magistrate of the Lyallpur District. In the course of the investigation the police took possession of 849 bags of wheat. These bags were obtained from various persons and of these 200 were taken from the firm of Ganga Ram-Shankar Das, 150 from the firm of Bhag Mal-Lachhman Das, 125 from the firm of Ganda Mal-Shankar Das and 60 from Buta Ram-Gobind Ram. When these bags were taken from the firms mentioned each firm produced a *ruka* or order signed by one Teeja Ram, admittedly an agent of the firm of Rejoo Mal-Topan Das and the members of the firms concerned claimed to be the owners of the bags of wheat taken from them, alleging that Teeja Ram had made over these bags of wheat to them, in lieu of debts due by the firm of Rejoo Mal-Topan Das to them, respectively. As a matter of fact these bags had been lying at the Railway Station and had been made over to these firms on the strength of the *rukas* or orders by the broker Jawala Ram.

In the course of arguments Mr. Sheo Narain produced these *rukas* and copies of them are to be found in the police diaries. Mangan Mal was tried and on the 23rd of November 1914 convicted under section 420, Indian Penal Code, by the Magistrate above named who, during the pendency of the trial, had directed the sale of the wheat taken possession of, including these 535 bags. Mangan Mal was acquitted by the learned Sessions Judge, Mr. A. H. Brasher, on the 11th of January 1915, who at the end of his judgment directed that the money deposited in connection with these cases should be sent to the Official Receiver, Karachi; in other words he considered that the wheat taken possession of by the police was the property of the insolvent firm and formed a part of that firm's assets to which the said Official Receiver was entitled. On the 6th of April 1915 the present respondents filed a *revision* before the Sessions Judge asking him to reconsider his order directing the sale-proceeds of the wheat contained in the 535 bags to be made over to the Official Receiver. The learned Sessions Judge thereupon on the 17th of May 1915 *revised* his order and

directed that the sale-proceeds of these 535 bags should be given to the present respondents instead of to the Official Receiver, Karachi.

Against this order the Official Receiver has filed the present revision and Mr. Nanak Chand has argued the case on his behalf before me. He has urged that the order of the 17th May 1915 is really an order reviewing the order passed by the learned Sessions Judge on the 11th January 1915 and has urged that the learned Sessions Judge was not competent to review his own order. He has relied on 8 *P. R.* 1909 (1), *I. L. R.* 35 *Cal.* 350 (2), *I. L. R.* 22 *Bom.* 949, (3), 30 *I. C.* 136 (4), *I. L. R.* 38 *All.* 134 (5) and 21 *I. C.* 447 (6). As a matter of fact section 369, Criminal Procedure Code, is clear and the learned Sessions Judge's order reviewing his judgment of the 11th of January 1915 is obviously illegal and I therefore need not refer to Mr. Nanak Chand's other contentions as to want of notice to his client. Mr. Sheo Narain for the respondents has admitted that if the order of the learned Sessions Judge directing the money to be paid to the Official Receiver be regarded as an integral portion of his judgment then no review lay. He has however contended that that portion of the judgment can be separated as not having anything to do with the guilt or innocence of the person accused, *i.e.*, Mangan Mal, and he therefore argues that under section 520, Criminal Procedure Code, the learned Sessions Judge was acting within his powers when he passed the order of the 17th of May 1915. He has referred me to the case *in re* Malak Umar Hayat Khan reported as 2 *P. W. R.* 1910 (*Cr.*) (7) as an authority for his proposition. That was a case in which certain remarks had been made in the judgment reflecting on the character of a witness and it was there held that this Court had power to expunge those remarks. In my opinion the present case is quite different and I consider that the order directing the payment of the money to the Official Receiver cannot be separated from the rest of the judgment as Mr. Sheo Narain wishes to have done. The learned Sessions Judge's order being therefore illegal must be set aside and I set it aside accordingly.

(1) 8 *P. R.* (*Cr.*) 1909 (*Hira v. King-Emperor*).

(2) (1908) *I. L. R.* 35 *Cal.* 350 (*Parbati Charan v. Sajjad Ahmad*).

(3) (1897) *I. L. R.* 22 *Bom.* 919 (*In re Harilal Buch*).

(4) (1915) 30 *Indian Cases* 136 (*Narasinga Rao v. Vittoba Rao*).

(5) (1915) *I. L. R.* 38 *All.* 134 (*Emperor v. Gobind Sahai*).

(6) (1913) 21 *Indian Cases* 447 (*Ram Dulare v. Ajudhya Singh*).

(7) 2 *P. W. R.* (*Cr.*) 1910 (*In re Malak Umar Hayat Khan*).

Mr. Sheo Narain then pointed out that as a matter of fact the order of the 17th of May 1915 was the correct order and that if it were set aside the present respondents would be compelled to file a revision of the order dated the 11th January 1915 in this Court and has asked me, in order to avoid the delay and trouble that that would entail, to consider the correctness or otherwise of that order under section 439, Criminal Procedure Code, in the present proceedings. Mr. Nanak Chand, while admitting that I have the power under section 439 to consider the matter and to pass such orders as may be just and equitable, urges that as an inquiry is necessary I should refrain from taking the action suggested by Mr. Sheo Narain.

I have heard both Mr. Nanak Chand and Mr. Sheo Narain on the merits and I consider it would be beneficial to all the parties concerned if I take action under section 439 and pass an appropriate order in this case. I have referred to the *rukas* or orders upon which the present respondents obtained possession of the bags of wheat totalling 535 in all. Copies of these are in the police diaries and Mr. Nanak Chand has admitted that as a matter of fact the police took these bags of wheat from the respondents. He also has admitted that no offence has been committed in connection with these bags and *prima facie* it seems to me only just and equitable that these present respondents should be restored to their original position as far as possible. Mr. Nanak Chand says that he does not admit the genuineness of those *rukas* nor the power of Teeja Ram to have executed them, although he admits that Teeja Ram was the agent of the insolvent firm. He urges that the present respondents should be left to bring forward any claim they may have against the insolvent firm in the ordinary course during the insolvency proceedings. It seems to me however that it would not be equitable to deprive the respondents of monies which *prima facie* belong to them. The Official Receiver, if he considers that the action of Teeja Ram was *ultra vires* or that any undue preference was shewn to these respondents by the insolvent firm can take appropriate action under the Insolvency Act. Acting under section 439 therefore I direct that the proceeds of the 535 bags of wheat be made over to the present respondents according to their respective shares.

Revision accepted.

No. 26.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge and
Hon. Mr. Justice Chevis.*

KARM SINGH—(CONVICT)—APPELLANT,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 287 of 1916.

Confession of accused to zaildar—inducement—presence of Police—retracted confession of one accused—value of, as against himself and as against co-accused—corroboration.

One of the accused charged with murder made a confession to a Zaildar and another accused confessed to a Magistrate.

Held, that evidence of the confession to the Zaildar could not be received :—

(1) Because the Zaildar remarked that his brother had committed a murder and had got off on making a clean breast of it and this was inducement.

(2) As the police were in the immediate vicinity at the time of confession and thus it was doubtful whether the confession was not practically made to them.

(3) As accused was at the time in police detention as a suspect and to all intents and purposes in police custody and thus no confession could be proved unless made to a Magistrate.

Held also, that the confession of the other accused retracted at the first opportunity was not sufficient to prove his own guilt and could not be relied on as proof of the guilt of his co-accused without corroboration.

*Appeal from the order of Major F. C. Nicolas, Sessions Judge,
Rawalpindi, dated the 20th March 1916.*

Nemo, for Appellant.

Public Prosecutor, for Respondent.

The judgment of the Court was delivered by—

CHEVIS, J.—This judgment will cover the three connected appeals Nos. 288, 289 and 290 of 1916. 23rd May 1916.

The four appellants Gurmukh Singh, Ishra Singh, Karm Singh and Amolak Ram have been convicted of the murder of Bhagat Singh, and have been sentenced to death. Karm Singh and Amolak Ram have appealed through jail, and Ishra Singh and Gurmukh Singh through counsel. The case of each convict is also before us under section 374, Criminal Procedure Code, for orders as to confirmation of the death sentence.

The following facts are not disputed. Bhagat Singh lived at village Kazian, some 7 miles from Gujar Khan. He was

murdered on the night of the 29th December 1915, by blows of a sharp edged weapon. The deceased was sleeping that night in a room by himself. He had recently been married, but his wife had not yet come to live with him. His father, a patwari, was living in the Jhelum district. Deceased was a young man of about 18 years of age. He was sleeping in a room by himself on the night of the murder. His sister, Mussammatt Soma Wanti, aged about 14 or 15, and his younger brothers and sister were sleeping in another room in another part of the same compound. The murderer, or murderers, after killing Bhagat Singh, attempted to hide traces of the crime by setting fire to the deceased's bedding and to a neighbouring hut in which *bhusa* was stacked, but Mussammatt Soma Wanti was awakened by smoke entering the room in which she was sleeping, and she went out and gave the alarm and the neighbours came and the fire was extinguished. Report of the murder was sent off to the *thana*, and the usual police investigation began. The only question is whether it is proved that the present appellants committed the murder.

In the report made at the *thana* it was stated that nothing was known as to who had committed the murder.

The motive now alleged is that the deceased had been carrying on an intrigue with Gurmukh Singh's sister, and that Gurmukh Singh got the other three appellants to join him in committing the murder. The four appellants are apparently not related to one another in any way. Apart from the alleged motive it is not stated that any of them had any reason to bear ill-will towards the deceased. On the contrary Ishra Singh and Karm Singh are said to have been on friendly terms with him and to have taken tea with him on the evening preceding the murder. A statement by Soma Wanti as to the tea drinking led to Ishra Singh and Karm Singh being sent for by the police and questioned. Further, a post card dated 17th December addressed to Karm Singh who had been to a place in the Bahawalpur State fell into the hands of the police. This card told him to return quickly, as his mother was ill. This card is said to have aroused further suspicion, as the card purported to have been written by Seva Ram, brother of Karm Singh, and the learned Government Advocate tells us that Seva Ram is illiterate, that Karm Singh's mother was not really ill, and that the card was really written by the deceased. If this really be so, though it is not proved by the evidence on the record it would rather go to support the idea of Karm Singh and deceased being on friendly terms than to help the theory of any enmity.

Then we are told that on the evening of the 31st December 1915, Qazi Bagh Ali, the local Zaildar, joined the investigation, and after he had dropped a remark to the effect that his own brother, Muhammad Hussain, had committed a murder but had got a pardon on telling the whole truth, the suspect Karm Singh said he would tell the Zaildar all about it if every body else left the room. The police then left the room, and Karm Singh confessed to the Zaildar, implicating himself and the other three appellants. The police were then recalled, and then Karm Singh led the party to a place about 150 paces from the village where he dug up the head of a hatchet buried in a field.

Ishra Singh's house was then searched and two blood stained articles, *viz.* a pair of *pyjamas* and a piece of muslin were there found. The report of the Imperial Serologist shows that human blood was found on these articles.

Nothing was found in the houses of Gurmukh Singh and Amolak Ram, but on the 11th January Amolak Ram, who had been arrested on the 2nd January, was produced before a Magistrate and made a confession.

We will first deal with the confession of Karm Singh to the Zaildar, which the learned Sessions Judge has found to be admissible. This confession seems to us open to objection on three grounds. First we have the fact that the Zaildar dropped a remark that his brother had committed a murder and had got off on making a clean breast of the matter. The Zaildar was not in charge of the investigation, but he is a leading man, holding a Government post and this was distinct inducement to Karm Singh to make a confession. Next it seems clear that the police were in the immediate vicinity at the time of the confession, and it is doubtful whether the confession was not practically made to them. Lastly it seems clear that though not handcuffed Karm Singh was in police detention as a suspect, and was not free to leave the place even had he wanted to do so, and so he must be regarded as to all intents and purposes in police custody, and in such a case the law is clear that no confession can be proved unless made to a Magistrate. We think then that the evidence as to Karm Singh's confession to the Zaildar must be ruled out.

Then as to the alleged intrigue between deceased and Gurmukh Singh's sister. As already remarked no mention of this is made in the first report. The prosecution case here rests on the evidence of the Zaildar's relation Muhammad Hussain, described in the Zaildar's evidence as a brother of the

Zaildar, though apparently not a brother as the two are sons of different fathers according to the record. This man says he several times saw deceased and the girl talking together. This witness was some years ago arrested in a murder case, but got off on a pardon. His evidence, even if true, does not go far; he is the sole witness on the point, and after looking up his first statement to the police, as stated in the police diaries, we have no hesitation in rejecting it. We note that the Sessions Judge has not recorded any finding as to whether he relies on it.

Disregarding the evidence now ruled out, we find the evidence against each appellant to amount to the following:—

- (1) Against Karm Singh, there is the production of the head of a hatchet, and the retracted confession of Amolak Ram.
- (2) Against Ishra Singh, the finding of the blood stained *pyjamas* and Amolak Ram's confession.
- (3) Against Amolak Ram, his own confession.
- (4) Against Gurmukh Singh, Amolak Ram's confession.

As to the hatchet head no blood was found on it, and so there is no proof that it was the head of the weapon with which the murder was committed. The head found was notched, and the medical evidence renders it further doubtful if this is the head of the weapon with which the murder was committed. The evidence of Mangal Singh (P. W. 16) as to having seen deceased and Karm Singh together while the latter sharpened this particular axe head on the night of the murder we regard as of no value whatever. The witness says he had never seen an axe head like this before, and so took it in his hand, but what the peculiarity in this particular axe head was is nowhere made clear from the evidence

As to the blood stained *pyjamas* and piece of muslin found in Ishra Singh's house, this would be of more value if we were told how many people live in this house, but the Sub-Inspector, the Circle Inspector and even the Zaildar (though the last lives in the same village) are unable to tell us how many brothers Ishra Singh has, or whether they all live in the same house. The mere fact that a blood stained garment is found in a house is not sufficient proof that any particular member of the family residing in that house is guilty of a murder which has recently been committed in the village. There is no clear proof that either the *pyjamas* or the piece of muslin belong to Ishra Singh.

Then as to Amolak Ram's retracted confession, and first as to its value when considered as against himself. When such a confession is the sole evidence against a man it can be of but little value, especially remembering the race for a pardon which sometimes occurs when a number of persons are suspected of an offence, and others have already confessed or are believed to have already confessed. In such a case even innocent men may think the best way out of the difficulty is to make a confession and hope for a pardon. And the value of such a confession as against the co-accused is even less, for if in practice it is generally held that the evidence of an approver, who is put on oath and subjected to the test of cross-examination should not be relied on unless corroborated, still more so should this be the rule in the case of a confession of a co-accused retracted at the first opportunity. We may further remark that the confession in question shows the motive for the confessor's joining in the murder to be a bribe of Rs. 100, none of which was paid in advance and none of which has yet been paid, further, that the confession hardly fits in with the discovery of an axe head buried in a field, as according to the confession both head and handle of the axe were left at the scene of the murder.

We consider the evidence far too weak to warrant the conviction of any one of the appellants, and we accept all four appeals and reversing finding and sentence we acquit the four appellants and order them to be released.

Appeals accepted.

No. 27.

*Before Hon Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Chevis*

SED RASUL AND ANOTHER—(CONVICTS)—APPELLANTS,
Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 170 of 1916.

*Indian Penal Code, sections 326, 457, 458 and 460—house-breaking
followed by stabbing*

The facts found were that the two appellants broke into the house of one T. S. at night with intent to commit theft, armed with deadly weapons, left the house on an alarm being raised and in the courtyard stabbed one R. S. who tried to seize them, injuring him so that he died later on, and that they were pursued and captured some 700 *karams* from the village.

Held, that as the stabbing was done *after* the house-breaking was complete section 460 of the Penal Code did not apply, but that the appellants were guilty of offences under sections 457, 458 and 326.

17 P. R. (Cr.) 1876 (1) and 2 P. R. (Cr.) 1882 (2), referred to.

Appeal from the order of Major R. W. E. Knollys, Sessions Judge, Hoshiarpur, dated the 29th January 1916.

Muhammad Din, for Appellants.

Public Prosecutor, for Respondent.

The judgment of the Court was delivered by—

27th May 1916.

SIR DONALD JOHNSTONE, C. J.—Two persons, Sed Rasul and Abdul Khannam, have appealed against their convictions under section 460, Indian Penal Code, and the sentences of transportation for life which followed those convictions.

The case for the crown is that the two appellants broke into the house of one Thakar Singh at night, with intent to commit theft and armed with deadly weapons, threatened and injured the inmates, left the house on an alarm being raised, and in the courtyard stabbed one Ram Singh, who tried to seize them, injuring him so that he died later on, and that they were pursued and captured some 700 *karams* from the village. The stabbing is said to have been done by Sed Rasul who turned back to help Abdul Khannam, with whom Ram Singh had grappled.

Counsel for the appellants has to admit—indeed the record shews there can be no reasonable doubt on the point—that house-breaking followed by stabbing, did take place, but he denies that his clients were in it. He points out also certain small ambiguities, such as that the “first report,” says appellants were two of the thieves (and not the two only thieves) and that the dacoity took place in the house of “Ram Singh and Dal Singh.” The latter point is easily cleared up, for Dal Singh is the father of Thakar Singh aforesaid and was asleep on the roof and took no part in the affair, while the houses of Ram Singh and Dal Singh (*cum* Thakar Singh) are practically side by side and are in a common courtyard. As to the other point, perusal of the deposition of P. W. 11 who wrote the report and sent it to the *thana* by the *chaukidar*, shews that, though he himself thought there were only these two thieves, people said there were more and so he wrote as he did. We do not think this helps the appellants in any way.

In short we think the evidence of the doctor, of Thakar Singh, of Mussammat Gokli (his wife), transferred from the

(1) 17 P. R. (Cr.) 1876 (*Imamud Din v. Crown*).

(2) 2 P. R. (Cr.) 1882 (*Jaffir v. Empress*).

Committing Magistrate's file, of Sunder Singh son of Ram Singh aforesaid, of Rulia weaver, of Khem Singh, weaver, of Lehna, weaver, of Thaman Singh, of Hari Singh, fully prove the house-breaking by night, the intent to commit theft, the appellants being armed with deadly weapons, and their pursuit and capture after the stabbing of Ram Singh. There is no defence evidence in rebuttal.

The legal point taken by appellant's counsel is, however, good, though it does not really benefit his clients at all. The stabbing of Ram Singh was done after the house *breaking* was complete, and therefore, see rulings noted in the margin, section 460, Indian Penal Code, does not apply. It appears that the house-breaking by night with intent to commit theft (or the house-breaking after preparation to cause hurt) was completed first, and then, as a separate transaction, grievous hurt was caused by a dangerous weapon, both accused being equally liable under section 34, Indian Penal Code. We therefore accept the appeal and instead of one conviction of each accused under section 460, Indian Penal Code, we convict and sentence each accused as follows :—

17 P. R. 76 (Cr.) (1)
2 P. R. 82 (Cr.) (2)

Under sections 457—458, Indian Penal Code, to 14 years' transportation. Under section 326, Indian Penal Code, to 6 years' transportation, the two sentences to run consecutively.

Appeal accepted.

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No. 28.

Before Hon. Mr. Justice Shadi Lal.

KALI DASS—(COMPLAINANT)—PETITIONER,

Versus

KARAM CHAND AND ABDUL AZIZ—(ACCUSED)—
RESPONDENTS.

Criminal Revision No. 650 of 1916.

Jurisdiction (Criminal)—printing book at Lahore—infringement of copyright—whether triable at Gujranwala—Indian Copyright Act, III of 1914, section 7 (a)—Criminal Procedure Code, Act V of 1898, sections 177 and 179—loss caused to complainant at Gujranwala.

Held, that a person charged with an offence under section 7 (a) of the Indian Copyright Act, by reason of having printed a certain book for sale at Lahore, can only be tried for the offence at Lahore, *vide* section 177 of the Code of Criminal Procedure.

Held also, that section 179 of the Code had no application to the case as the section embraces only such consequences as modify and complete the Act alleged to be an offence, and loss to the complainant is not an essential ingredient of the offence described in section 7 of the Copyright Act.

(1) 17 P. R. (Cr.) 1876 (*Imamud Din v. Crown*).

(2) 2 P. R. (Cr.) 1882 (*Jaffir v. Empress*).

Revision from the order of A. W. J. Talbot, Esquire, Additional Sessions Judge, Gujranwala Division, at Lahore, dated the 30th March 1916.

G. C. Narang, for Petitioner.

Devraj Sawhney, for Respondents.

The judgment of the learned Judge was as follows:—

29th May 1916.

SHADI LAL, J.—This is an application for revision by the complainant Kali Das against the order of the Sessions Judge holding that the Gujranwala Court had no jurisdiction to entertain the complaint under section 7 (a) of the Indian Copyright Act, III of 1914. There are two accused—Karam Chand, the proprietor of the Punjab National Steam Press, Lahore, and Abdul Aziz, a book-seller of the same place; and the allegations against them are that they infringed the copyright in a book, of which the complainant is the author, by printing it for sale at Lahore without his permission. Now the printing of the book for sale undoubtedly took place at Lahore, and it seems to me that the offence under section 7 (a), of which they were convicted by the Magistrate, was committed outside the jurisdiction of the Gujranwala Court. Under the aforesaid provision of the law a person is deemed to commit an offence, when he “knowingly makes for sale or hire any “infringing copy of a work in which copyright subsists.” There can be no manner of doubt that if the allegations of the complainant are correct, the printing for sale of the offending copies of the book was done at Lahore, and that only the Lahore Court had jurisdiction under section 177, Criminal Procedure Code, to inquire into and try the offence.

The learned counsel for the petitioner places his reliance upon section 179, Criminal Procedure Code, and contends that the loss in consequence of the offence was caused to the complainant at Gujranwala, his place of residence, and that the Gujranwala Court, being the Court within the local limits of whose jurisdiction the consequence had ensued, was entitled to entertain and adjudicate upon the complaint. To this contention I am unable to accede. Upon the wording of the section and the authorities dealing with it there can be little doubt that the consequence referred to must be one of the facts to be proved to establish the offence. It must form an integral part of the offence, and need not only be a consequence arising from it. The words of the section embrace only such consequence as modify or complete the act alleged to be an offence. In the case before me the loss to the complainant is not an essential ingredient of the offence described in section 7 (a) of

the Copyright Act. Suppose a man prints, with the intention of selling, 500 copies of a book in which the complainant has got a copyright, but before the former sells a single copy, the latter institutes a complaint under section 7 (a). No loss has yet occurred to the complainant, because no copy has been sold; yet it is manifest that the person printing the copies has rendered himself liable under the aforesaid provision of the law. This illustration demonstrates beyond doubt that the causing of loss is not an integral part of the offence, though in the majority of the cases, loss does, as a matter of fact, arise from the commission thereof.

The decisions of this Court and the High Courts, which deal with the question of jurisdiction in cases of criminal breach of trust and criminal misappropriation, really proceed upon the wording of section 181, sub-section (2), Criminal Procedure Code, and have no relevancy to the matter before me. The learned counsel on both sides are unable to cite a single judgment which relates to jurisdiction in connection with offences under the Indian Copyright Act. The matter is, therefore, *res integra*. After a careful consideration of the language of the relevant clause, I am of opinion that the offence was complete, as soon as the books infringing the copyright work were printed, and that it did not depend for its completion upon the ensuing of any consequence, such as is contemplated by section 179, Criminal Procedure Code.

Accordingly I hold that the judgment of the Magistrate was *coram non judice*, and that the complainant must institute his complaint in a Court competent to entertain it. The application for revision is rejected.

Revision rejected.

No. 29.

Before Hon. Mr. Justice Scott-Smith and Hon. Mr. Justice Broadway.

ATTAR SINGH AND OTHERS—PETITIONERS,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 309 of 1916.

Criminal Procedure Code, Act V of 1898, section 476—Sessions Judge directing prosecution of witnesses for perjury—delay of some 3 months after recording their statements—and also in regard to evidence taken before Committing Magistrate and transferred to Sessions record.

In the present case the Sessions Judge convicted certain persons of murder and sentenced them to death and some 3 months later, when

the appeal had been decided by the Chief Court and the record returned to his Court, took action against the 9 petitioners under section 476 of the Code of Criminal Procedure and ordered their prosecution for offences under section 191 of the Penal Code. In the case of 8 of the petitioners the alleged false evidence was given before the Sessions Judge himself and in the case of the ninth petitioner the evidence was given before the Committing Magistrate and transferred to the Sessions record and read out as evidence at the trial.

Held, that the evidence taken of one of the petitioners before the Committing Magistrate, having been read out as evidence in the Sessions Court, was certainly brought under the notice of that Court in the course of a judicial proceeding within the meaning of section 476 of the Code of Criminal Procedure and the Sessions Judge's order for his prosecution was consequently not *ultra vires*.

6 *All. L. J.* 392 (1), referred to.

6 *P. R. (Cr.)* 1909 (2), distinguished.

Held also, that there is nothing in section 476 which requires the Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter and that in this case the Sessions Judge was fully justified in waiting until the appeal had been decided by the Chief Court.

1 *L. R.* 32 *Bom.* 184 (3), 13 *All. L. J.* 466 (4) and *Cr. Rev. No.* 639 of 1916 (unpublished), followed.

1 *L. R.* 34 *Cal.* 551 (*F. B.*) (5), 1 *L. R.* 31 *Mad.* 140 (*F. B.*) (6) and 1 *L. R.* 32 *Mad.* 49 (*F. B.*) (7), not followed.

Revision from the order of S. Wilberforce, Esquire, Sessions Judge, Ferozepore Division, dated the 31st January 1916.

B. Bevan Petman, for Petitioners.

Government Advocate, for Respondent

The judgment of the Court was delivered by—

30th May 1916.

SCOTT-SMITH, J.—The present order disposes of three applications for revision presented by Attar Singh and eight other persons against the order of the Sessions Judge of Ferozepore passed under section 476, Criminal Procedure Code, ordering their prosecution for offences under section 194, Indian Penal Code.

In the case of eight of the petitioners the alleged false evidence was given before the Sessions Judge himself. In the case of Maghar Singh (Criminal Revision No 310 of 1916)

(1) (1909) 6 *All. L. J.* 392 (*Giricar Prosad v King Emperor*).

(2) 6 *P. R. (Cr.)* 1909 (*Crown v. Mussammatt Dauli*).

(3) (1907) 1 *L. R.* 32 *Bom.* 184 (*In re Lakshmidas*).

(4) (1915) 13 *All. L. J.* 466 (*Tilak Pandey v. Emperor*).

(5) (1907) 1 *L. R.* 34 *Cal.* 551 (*F. B.*) (*Bequ Singh v. Emperor*).

(6) (1908) 1 *L. R.* 31 *Mad.* 140 (*F. B.*) (*Rahimadulla Sahib v. Emperor*).

(7) (1908) 1 *L. R.* 32 *Mad.* 49 (*F. B.*) (*Aiyakannu Pillai v. Emperor*).

the evidence was given before the Committing Magistrate, the petitioner being too ill to attend the Sessions Court. His evidence recorded by the Committing Magistrate was however transferred to the Sessions record and read out as evidence at the trial.

The main ground for revision in the case of all the nine petitioners is that inasmuch as the judgment of the learned Sessions Judge in the original case was pronounced on the 12th October 1915 and the proceedings under section 476, Criminal Procedure Code, were not instituted until three months or more after that date, the order for their prosecution was passed without jurisdiction. As regards Maghar Singh's case, an additional ground is urged that inasmuch as the statement of the petitioner was not made before the Sessions Judge the order for his prosecution was *ultra vires*. In support of this latter contention counsel for the petitioner relies upon 6 *P. R.* 1909 (Criminal) (1) in which it was held that it is only the individual Magistrate before whom the offence was committed in Court who can take action under section 476, Criminal Procedure Code. In that case not only was the statement for which the prosecution was ordered not made before the Magistrate who passed the order, but also it was not brought to his notice in the course of a judicial proceeding. We consider the present case to be distinguishable. The proceedings before the Committing Magistrate were only of the nature of a preliminary enquiry, the real trial took place in the Court of Session, and though Maghar Singh did not give evidence in that Court, his statement recorded by the Committing Magistrate was read out in evidence and was certainly brought to the notice of the Sessions Judge in the course of a judicial proceeding. In the case reported in 6 *All. Law Journal*, page 392 (2), it was held that the words "brought under its notice" were wide enough to cover an offence which may have been committed in another forum and on some previous occasion, but it must be an offence brought under the notice of the Court holding the inquiry. There can be no doubt that the offence, if any committed by Maghar Singh was brought under the notice of the Sessions Judge in the trial before him.

On the main point which is urged on behalf of all the petitioners we have been referred to the principal rulings of all the High Courts. The Calcutta and Madras High Courts

(1) 6 *P. R.* (Cr.) 1909 (*Crown v. Mussamat Dauli*).

(2) (1909) 6 *All. L. J.* 392 (*Girwar Prosad v. King-Emperor*).

have adopted one view and the Bombay and Allahabad Courts the other. In *I. L. R. 34 Cal.*, page 551 (1), it was held that the power conferred by section 476, Criminal Procedure Code, is exerciseable only at or immediately after the conclusion of the trial. The judgment in that case was by five Judges of the High Court and was unanimous. In *I. L. R. 31 Mad.*, page 140, (2) it was held by a Full Bench of three Judges (Miller, J. dissenting) that it was the intention of the Legislature in enacting section 476 that an order under the section should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceedings. The judgment in *34 Cal. 551 (1)* was referred to and followed. Again in *I. L. R. 32 Mad.* at page 49 (3), a Full Bench of five Judges (Miller, J. again dissenting) came to the same conclusion. In the *31 Mad.* case at page 149 (2), Miller, J. stated as follows:—"I agree " that the section contemplates immediate action, that is to " say, that the language of the section warrants and provides " for immediate action, but I am unable to go further, and to hold that, it either expressly or impliedly excludes what " I may call action subsequent—action taken after the close " of the proceedings in the course of which the offence was " committed or brought to notice. The words, when the " Court is of opinion, are wide enough to embrace any point " of time at which the opinion is formed, whether during " or after the close of the proceedings, and there is " nothing in the rest of the section to indicate that the " opinion must, in all cases, be formed as soon as the offence is " committed."

In *I. L. R. 32 Bom.*, page 184 at page 190 (4), the case reported as *I. L. R. 34 Cal.*, page 551 (1), was considered and dissented from, the Judges holding that there was nothing in the language of section 476 which made it incumbent upon a Court acting under it to exercise the power within any period or at any particular time. They considered that such a construction would necessitate the importing into the section of words which are not there. A similar view was taken in *13 All. L. J.* at page 466 (2) where following the previous

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- (1) (1907) *I. L. R. 34 Cal. 551 (F. B.) (Begu Singh v. Emperor)*.
 - (2) (1908) *I. L. R. 31 Mad. 140 (F. B.) (Rahimadulla Sahib v. Emperor)*.
 - (3) (1908) *I. L. R. 32 Mad. 49 (F. B.) (Aiyakannu Pillai v. Emperor)*,
 - (4) (1907) *I. L. R. 32 Bom. 184 (190) (In re Lakshmidas)*.
 - (5) (1915) *13 All. L. J. 466 (Tilak Pandey v. Emperor)*.

rulings of the Allahabad Court it was held that there was nothing in section 476 which requires a Court to take action if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. The Judges remarked: "Cases can easily be imagined where it would be impossible or inadvisable to take action immediately on the conclusion of the case."

In the present case the Sessions Judge had convicted certain persons of murder and had sentenced them to death; and what he did was to wait till the appeal had been decided by this Court. Directly the record was returned to him he issued notice to the petitioners to show cause why they should not be prosecuted for giving false evidence. It is possible that this Court in appeal might have taken a different view of the evidence to that taken by the learned Sessions Judge and this might have influenced him in any order which he thought fit to pass under section 476, Criminal Procedure Code. We therefore think that in the present case the Sessions Judge was fully justified in waiting until the appeal had been decided.

We have carefully considered the rulings set forth above and we agree with the view taken by the Bombay and Allahabad High Courts for the reason, as stated in those judgments, that there is nothing in the section which requires the Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. The same view was taken in a case which recently came before a single Judge of this Court (Criminal Revision No. 639 of 1916, decided on the 21st of March 1916).

We therefore reject all the applications for revision.

Revision rejected.

No. 30.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Scott-Smith.*

RAS—(CONVICT)—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 1531 of 1915.

Indian Forest Act, VII of 1878, sections 25 (1) and 76—whether accused can be convicted for two offences for one act of carelessness and for indirect consequence of his act—Indian Penal Code, section 71.

The facts found were that accused kindled a fire in his master's garden and left it burning, that this fire spread to the Bhadwar *shamilat*, an unclassed forest, and thence to the Tattal Reserved Forest. The accused was accordingly convicted of two offences, *viz.* (1) under section 76 of the Forest Act, read with rule 28 of Punjab Government Notification No. 61 of 26th January 1897, and (2) under section 25 (b) and Notification No. 1137 of 3rd October 1904.

Held, that in the absence of any evidence or allegation to the contrary the Bhadwar *shamilat* must be held to be unassessed waste land situate in Bhadwar village to which Punjab Government Notification No. 61 of 26th January 1897 is applicable and conviction (1) was consequently justified.

But held, that a person cannot be said to set fire to a thing, if it catches fire as an indirect consequence of his act, and consequently conviction (2) was not justified by the mere fact that the fire spread from the Bhadwar *shamilat* to the Tattal Reserved Forest, a mile away from the former.

Held further, that as petitioner committed only one act of carelessness, he could not be tried and punished for two separate offences having regard to section 71 of the Indian Penal Code.

Revision from the order of Major R. W. E. Knollys, Sessions Judge, Kangra, dated the 8th September 1915.

Tek Chand, for Petitioner.

Assistant Legal Remembrancer, for Respondent.

The judgment of the Court was delivered by—

8th June 1916.

SCOTT-SMITH, J.—Petitioner has been convicted (1) under section 76 of the Forest Act, read with rule 28 of Punjab Government Notification No. 61 of 26th January 1897, and (2) under section 25 (b) of the Forest Act, read with rule 1 of Punjab Government Notification No. 1137 of 3rd October 1904.

The learned Judge who ordered that notice should issue on this application for revision remarked that the finding of fact arrived at by the lower Courts could not be disturbed, but that the interpretation of section 25 (b) and of the Notification No. 61 of 26th January 1897 was not free from difficulty and should be considered.

The facts as found are, that the petitioner kindled a fire of brushwood in the garden of his master. Lala Brij Lal, that this fire spread to the Bhadwar Unclassed Forest and thence to the Tattal Reserved Forest.

The first charge is, that petitioner kindled the fire in his master's garden without taking all reasonable precautions to prevent its spreading to any of the 1st class trees or that he left such fire burning in the vicinity of such trees.

The trees of the unclassed forest are in the Bhadwar *shamilat*, which belongs to the villagers, and is therefore private property. The Local Government has power under

section 75 of the Forest Act to make rules for the preservation of such trees, and Punjab Government Notification No. 61 of 26th January 1897 was issued thereunder. The schedule attached to the notification shows that it applies to all unassessed waste and forest land situated in Bhadwar village, and in the absence of any evidence or allegation to the contrary we take it that the Bhadwar *shumilat* is unassessed waste land.

In our opinion then the conviction under the first charge is fully justified because the fact that the fire spread to the *shumilat* and then to the unclassified forest shows that no proper precautions were taken.

With regard to the second charge the Magistrate holds that it is established in two different ways—

- (1) because petitioner set fire to the reserved forest, section 25 (b) of the Act.
- (2) because he set fire to the unclassified forest which is within a mile of the Tattal Reserved Forest, rule 1, Punjab Government Notification No. 437 of 3rd October 1904.

Now it is not alleged that petitioner directly set fire either to the unclassified forest or to the Tattal reserve; the contention is that his action in kindling a fire in his master's garden was the indirect cause of the two forests taking fire.

The Magistrate in interpreting the expression "sets fire to" refers to the Dictionary where "set" is given as meaning "to make or cause to be done," and apparently is of opinion that "sets fire to" means also "indirectly causes a thing to catch fire."

We do not think the expression "sets fire to" can be given this extended meaning; it is a compound expression and its meaning cannot be built up in the way the Magistrate has employed. In ordinary parlance a person is said to set fire to a thing if he puts a match to it or sets it on fire directly. A person cannot be said to set fire to a thing if it catches fire as an indirect consequence of his act.

We therefore hold that petitioner did not set fire either to the unclassified forest or to the Tattal reserve, and that his conviction under section 25 (b) of the Forest Act cannot be maintained.

We must also point out that petitioner committed only one act of carelessness and having regard to section 71, Indian Penal Code, he could not be tried and punished for two separate offences.

We allow the revision so far as to set aside the conviction and sentence under section 25 (b) of the Forest Act.

Petitioner has already undergone more than the sentence of one month's imprisonment awarded under section 76 of the Act, and he is therefore discharged from his bail.

Revision allowed.

No. 31.

Before Hon. Sir Donald Johnstone, Kt., Chief Judge.

MANGAL SINGH AND OTHERS—CONVICTS—
PETITIONERS,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 833 of 1916.

Indian Penal Code, sections 147 and 325—whether separate sentences are justified where the causing of the hurt turned the assembly into a riot—power of Sessions Judge on appeal, on setting aside one conviction, to enhance the other sentence—Criminal Procedure Code, Act V of 1898, section 423.

Held, following 4 P. R. (Cr.) 1901 (1) that where the use of violence and the causing of hurt was the thing which turned the assembly of the accused persons into an unlawful assembly and turned that unlawful assembly into a riot, separate convictions under sections 147 and 325 of the Penal Code are not justified.

Held also, that a Sessions Judge on appeal setting aside the conviction under section 325, Penal Code, with a separate sentence attached, has no power to enhance the sentence under section 147, vide section 423 of the Code of Criminal Procedure.

I. L. R. 22 Bom. 760 (2) and I. L. R. 30 Mad. 48 (3), referred to.

Revision from the order of A. W. J. Talbot, Esquire, Additional Sessions Judge, Lahore, dated the 24th April 1916.

Morton, for Petitioners.

Public Prosecutor, for Respondent.

The judgment of the learned Chief Judge was as follows:—

SIR DONALD JOHNSTONE, C. J.—In this case eleven persons have been convicted for having made a violent and unprovoked attack upon the complainant Mahna Singh and his friend Makhan Singh. The convictions have been had both under section 147 and section 325, Indian Penal Code, separately, and the sentences inflicted by the Magistrate are as follows:—
Under section 147, Indian Penal Code, three months' rigorous

9th June 1916.

(1) 4 P. R. (Cr.) 1901 (F. B.) (Bhagwan Singh v. Empress).

(2) (1896) I. L. R. 22 Bom. 760 (Queen-Empress v. Hanma).

(3) (1906) I. L. R. 30 Mad. 48 (Paramasiva Pillai v. Emperor).

imprisonment and Rs. 10 fine in each case and under section 325, Indian Penal Code, Bagga Singh, Arjan Singhand Khushal Singh nine months' rigorous imprisonment and Rs. 20 fine each and the remaining accused four months' rigorous imprisonment and Rs. 20 fine each.—Rs. 10 of the fine was to be paid to Mahna Singh as compensation and Rs. 15 to Makhan Singh. The sentences of imprisonment were to be consecutive. And there is also an order that after the expiry of the sentences the accused persons shall each furnish a bond under section 106, Criminal Procedure Code, in the sum of Rs. 500. The whole eleven appealed to the learned Additional Sessions Judge, who agreed with the first Court as to the facts but did not think there was any reason for treating Arjan Singh, Khushal Singh and Bagga Singh differently from the other accused. The sentences imposed on those three persons were therefore reduced to the same as the sentences inflicted upon the remaining eight. At the same time section 149, Indian Penal Code, was brought in, in order to legalise the double sentences.!

This revision has been argued before me both on the facts and on law. I will take up the facts first. I think there can be no doubt that the story told by the prosecution is in the main true and correct. The story put forward by the defence seems to me impossible and to be not proved. For the prosecution we have Mahna Singh and Makhan Singh, the persons who were noticeably injured, also Surain Singh, Kishen Singh, Daya Singh, Ladha Singh and Ganda Singh, who were eye-witnesses and all of whom except Daya Singh and Ganda Singh came to the rescue and received slight injuries. I suppose there can be no doubt that these witnesses must in the ordinary nature of things have consulted together before they gave their evidence, and therefore we find that every one of them pretends that he remembers exactly what weapon each of the 11 men was using. It seems to me quite impossible that 7 witnesses of a sudden fight, in which 11 men were the aggressors, could possibly remember details of this kind with complete accuracy. At the same time I do not think that this is a sufficient ground for rejecting the evidence. The only grievous hurt inflicted was that suffered by Makhan Singh who had a broken elbow and two fractured bones in his hand. The whole thing therefore was not very serious except from the point of view that a fight of this sort is always a dangerous thing and might have gone to great lengths. On the whole I do not see any sufficient reason for doubting that these 11 men did join in the attack. In the grounds for revision capital is made out of the Sessions Judge's

remark that perhaps the witnesses Daya Singh and Ganda Singh did not really see the affair at all. So far as I can make out this opinion is based solely upon the fact that these two men did not receive any injuries, which seems to me to be a very insufficient reason for rejecting their evidence, which is not open to suspicion on any other ground whatever. Then it is urged that the Sessions Judge admits that the witnesses for the prosecution are partisans. But it is unfortunately the case that in quarrels of this kind it is almost impossible to get anything but partisan evidence, and in my opinion the Sessions Judge was quite correct when he said that the question for him was whether the story for the prosecution or for the defence was more probable. One story or the other is certainly true, that is to say, true in the main, and the Court is perfectly justified even in a criminal case in such circumstances in holding that that story is the true one which is the more probable.

In my opinion the Courts below are wrong in inflicting double sentences in this case. 4 P. R. 1901 (Criminal) (1) is quite clear on the point, for in my opinion in the present case the use of violence and the causing of hurt was the thing which turned the assembly of these persons into an unlawful assembly and turned that unlawful assembly into a riot. It seems to me quite immaterial whether Makhan Singh's broken bones were caused by the very first blows or not. There was a general assault by the 11 persons and in the course of that general assault these bones were broken. It is because of that general assault and the breaking of bones which was its result that the accused are liable to be sentenced for rioting. The learned Sessions Judge goes on to say that, even if he is tied down to a conviction under section 147 alone, he has the power to enhance the sentence inflicted under that section and make it equal to the total of the sentences inflicted by the Magistrate. Here I think he is wrong. There is in this case a conviction under section 147 with certain sentences attached. There is a separate conviction under section 325 with separate sentences attached. If the conviction under section 325 is set aside, then nothing remains but the conviction under section 147, and section 423, Criminal Procedure Code, does not authorise the Sessions Judge to enhance sentence. It cannot be said that, in increasing the sentence under section 147 to the aggregate of the sentences inflicted by the Magistrate under sections 147 and 325 the Sessions Judge is simply "maintaining" the sentence. As to this, see *I. L. R.* 22 Bom.

(1) 4 P. R. (Cr.) 1901 (F. B.) (*Bhagwan Singh v. Empress*).

page 760 (1) and *I. L. R.* 30 *Mad.* page 48 (2). It seems to me therefore that the Sessions Judge should have confined himself either to one conviction or the other. There is difficulty in finding all these accused persons guilty under section 325 because the attack does not seem to have been a very determined one. At the most only three of the accused, namely Bagga Singh, Arjan Singh and Khushal Singh are alleged to have caused grievous hurt. I think therefore that the proper way of dealing with the matter is this. Bagga Singh, Arjan Singh and Khushal Singh should be convicted under section 147 read with section 325, Indian Penal Code, and should undergo sentences of 4 months' rigorous imprisonment each and Rs. 20 fine each inflicted by the Sessions Court under section 325, Indian Penal Code, or in default of payment of the fines two months' further rigorous imprisonment. The remaining 8 accused should be found guilty simply under section 147, Indian Penal Code, and suffer three months' rigorous imprisonment and Rs. 10 fine each or in default one month's further rigorous imprisonment. To this extent the revision is allowed and no further.

Revision allowed.

No. 32.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge, and
Hon. Mr. Justice Broadway.*

THAKAR DAS—(CONVICT)—APPELLANT,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 326 of 1916.

Evidence—circumstantial—when sufficient to justify conviction for a criminal offence.

Held, following 18 *Cal. W. N.* 1144 (3), that circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused.

But held also, that this *dictum* must be interpreted in a reasonable way. Thus the word "exhaustive" must not be taken to mean that every incident short of the actual commission of the offence must be proved by positive evidence, and the word "possibility" must not be treated as signifying "physical possibility" but a high degree of probability, that is, so high a degree of probability that a prudent man considering all the facts and realising that the life or liberty of the accused person depends upon the decision feels justified in holding that the accused committed the crime.

(1) (1896) *I. L. R.* 22 *Bom.* 760 (*Queen-Empress v. Hanma*).

(2) (1906) *I. L. R.* 30 *Mad.* 48 (*Paramasiva Pillai v. Emperor*).

(3) (1914) 18 *Cal. W. N.* 1144 (*Chiraguddin v. Emperor*).

Appeal from the order of F. W. Kennaway, Esquire, Sessions Judge, Mianwali, dated the 11th April 1916.

Beechey, for Appellant.

Assistant Legal Remembrancer, for Respondent.

The judgment of the Court was delivered by—

12th June 1916.

SIR DONALD JOHNSTONE, C. J.—The appellant in this case has been convicted on purely circumstantial evidence of the murder of one Paira Ram. Briefly put, the case for the prosecution is this:—

Appellant about last Christmas took service with Bawa Dialu Ram, incumbent of the *thakurdwara* near Kundian Station, these two being the only regular residents in the building. On February 8th the Bawa coming home from outside, found Paira Ram sitting, and he and his servant, the appellant, left Paira Ram there, when, at 9-30 or so that evening, they went to the *sarai* (300 to 350 yards distant) to see a play the railway babus had arranged. Paira Ram had been to Talagang to collect money and had Rs. 390 on him, and announced his intention of catching the early train for Darya Khan. The Bawa remained at the play continuously until 1-30 A. M., when he went home with appellant, who, however, had been absent from the play for an indefinite time after 10-30 or so, when there was an “interval.” With them went P. W. 4, Daulat Ram, a young man of Mianwali, who had come to see the play and intended to return home next morning. Arrived at the *thakurdwara* they found no Paira Ram but the *kotla* in confusion, clothes and matting burning which they attributed to mischief-making or carelessness on the part of the vanished guest. At 8 next morning, or perhaps earlier, Paira Ram’s dead body was found at a spot some 35 *karams* behind the *thakurdwara*, and, upon a search of the premises by the police, Rs. 390 and some papers and a railway ticket to Darya Khan (all the property of the murdered man) were found buried in the cow-house (*kotla* No. 4).

Mr. Beechey (for the appellant) has very rightly drawn our attention to pronouncements of high authority to the effect that “circumstantial evidence must be exhaustive and exclude “the possibility of guilt of any other person or must point “conclusively, to the complicity of the accused”—to quote the *dictum* in one of the latest cases, *Chiraguddin versus Emperor*, 18 C. W. N. 1144 (1); but we think it can be shown on the record here that the evidence in the present case is

“exhaustive” and does exclude the “possibility” of the guilt of any other person, provided the two words in inverted commas be interpreted in a reasonable way. Thus, “exhaustive” must not be taken to mean that every incident short of the actual killing must be proved by positive evidence; and “possibility” must not be treated as signifying “physical possibility.” Were the word so treated, convictions on circumstantial evidence would become in practice impossible; and therefore we take the word “possibility” to mean a high degree of probability that is, so high a degree of probability that a prudent man, considering all the facts and realising that the life or liberty of the accused person depends upon the decision, feels justified in holding that the accused committed the crime.

The medical evidence shows that murder was done. This needs no discussion. The doctor thinks probably more than one offender was concerned, but in our opinion this view is largely mere conjecture and cannot be taken as discrediting the case for the Crown. The finding of the corpse is clear, and the track evidence is unusually good. P. W. 13 Yusaf tracker, proves beyond reasonable doubt that certain footprints proceeding towards the corpse from *kotla* No. 1—the supposed scene of murder and the room in which articles, as already stated, had been found burning—were appellant's footprints, as also certain footprints returning, though by a slightly longer route, from the corpse to the *kotla*. The tracker took casts of some of the tracks, and he has noticed that the outward going tracks make a deeper impression than those returning because the appellant on the outward journey was carrying a heavy body. Neither in cross-examination, nor in argument before us, has the testimony of this witness been in any way shaken, and we are bound to take that testimony as bearing very heavily against the accused.

We turn next to appellant's alleged absence from the *sarai*. The good faith of the witnesses P. W. 5 to 8 need not be doubted. None of them is shown to have any sort of interest in the case, being railway servants present at the play. In our opinion their evidence, coupled with that of Bawa Dialu himself (P. W. 3) makes it fairly clear that appellant left the *sarai* about 10-30 P.M. and was not seen there again until 1-30 A.M. When he actually returned, it is naturally impossible to say. Thus *opportunity* for the commission of the murder by the appellant is proved. He says he never left the *sarai*, but he has made no attempt to call any of the spectators to prove this. Mr. Beechey argues that the Bawa, being a suspect himself and actually under arrest

for a time, has made up the story of appellant's absence in order to save himself; but we must reject this theory in view of the perfect *alibi* the Bawa has proved; we can see no sufficient reason in the circumstances for his concocting a false case against his own servant when he himself was quite safe.

We need not trouble about the weapons found, as none of them are blood stained, and there is nothing to connect them definitely with the murder; but we must allude to the articles which were found to have such stains. They are, according to the serologist, two pieces of cloth and a piece of blanket—see p. 8 paper book, while P. W. 2, Sub-Inspector says (p. 9) that the articles found to have blood stains were P. 2 (a *loi*) and P. 8 (*parchu*). The *loi* is apparently the "piece of blanket" and the description of P. 8 in the *fard* is no doubt a mistake for *parchat*. The *loi* is proved by the Bawa to be his, but to have been lent to appellant to wear. It was found in *kotla* No. 2. Further it is noteworthy that according to the Bawa, appellant *en route* to the *sarai* was wearing a shirt, that on returning home and seeing the fire and confusion, appellant said his shirt had been burnt—there were ashes about—whereupon the Bawa in perplexity said—"But you were wearing the shirt," which appellant promptly denied. Unless this episode is a complete fabrication, it tells strongly against the appellant.

There is thus a strong case against the appellant, and we need only look at the other discoveries in the case to see that the improbability that any other person but appellant did the murder is extreme. As already stated, the deceased's property was found hidden in *kotla* No. 4 and his body at some distance behind the house. Now if an outsider came along and made his way in and robbed and murdered Paira Ram, what motive could he have for removing the body, and what motive for hiding the plunder on those very premises? Such a murderer would know he might be surprised in the midst of his bloody work, and his one idea would be to get away as fast as possible, leaving the body in the house and so fastening suspicion on the inmates; and even if he was afraid of being caught with the identifiable part of the plunder on him, we think his impulse would at least have been to keep the silver money in his pocket and hide the rest in some place *that would later on be accessible to himself*. This in our opinion disposes of the theory of murder by an unknown outsider, and the idea that Daulat Ram may have been the offender is further negatived by his conduct: *could* he, having just done the deed, have actually joined the

Bawa and the appellant, made himself known to them and proposed to spend the night there? Murderers no doubt sometimes do foolish things, but would any man in the supposed circumstances have hung about the place? Would he not, on the contrary, have made tracks for home and taken care to avoid all contact with his fellow-creatures in those parts?

We have seen that the Bawa has a perfect *alibi*, and this really completes the argument: we are satisfied that appellant and no one else did the murder, and we reject his appeal and confirm the sentence of death.

Appeal rejected.

No. 33.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Broadway.*

HARBANS—(CONVICT),—APPELLANT,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No 333 of 1916.

*Criminal Procedure Code, Act V of 1898, sections 227, 231 and 232—
amendment of charge by Sessions Judge—power of Chief Court to order
new trial or convict accused of the original charge.*

The appellant was committed to the Sessions Court on a charge under section 460 of the Penal Code. This charge remained on the record until after the assessors had given their opinion when the Court recorded an order to the effect that the appellant should have been charged under section 302 and thereon amended the charge accordingly and convicted the appellant of that offence.

Held, that an amendment of the charge by the Sessions Court under section 227 of the Code of Criminal Procedure is only permissible up to the time of the taking of the opinion of the assessors and that the amendment in this case was, consequently, illegal.

Held also, that it is imperative under section 231 of the Code that the Court when it has altered the charge or added to the charge after the commencement of the trial should allow the prosecution and the accused to recall or re-summon and examine with reference to such alteration or addition, any witness who may have been examined and also to call any further witness whom the Court may think to be material.

Held further, that under the circumstances of the case the Chief Court on appeal could either set aside the conviction under section 302 and order a new trial (*vide* section 232 of the Code) or find the appellant guilty under section 460.

Appeal from the order of Lieutenant-Colonel B. O. Roe, Sessions Judge, Ambala, dated the 16th April 1916.

Amar Nath Chopra, for Appellant.

B. Bevan Petman, for Respondent.

The judgment of the Court was delivered by—

19th June 1916.

SIR DONALD JOHNSTONE, C. J.—In this case the learned Sessions Judge, Ambala Division, has convicted Harbans, accused, under section 302, Indian Penal Code, of the murder of one Mangal and has sentenced him to death. Harbans has appealed and we have heard his case argued by Lala Amar Nath Chopra, Pleader, Mr. Bevan Petman appearing on behalf of the Crown.

Turning to the merits of the case we can see no reasonable doubt that the accused person was one of a party of burglars who invaded the house of the deceased Mangal, robbed the deceased's widow, Jiwani, of ornaments, and ransacked the house, and that Mangal seized the appellant as he was making his escape and in the scuffle was mortally wounded by the appellant. The evidence for this is overwhelming. It consists of the depositions of Mussammatt Jiwani herself, Lawa, Parsa and Inder Singh. The appellant was captured on the spot, the witness, Indar Singh Jat, snatching from him an iron spear-head with which he had evidently done the fatal deed. The defence evidence is absurdly weak and it is unnecessary to detail it. A mere perusal of it shows that it in no way exonerates the appellant. Indeed in argument before us Mr. Amar Nath did not seriously urge that his client did not kill Mangal.

We have, however, arrived at the conclusion that conviction under section 302 is not in the circumstances according to law. In the first instance, the case was committed to the Sessions Court under section 460, Indian Penal Code, and the accused was asked to plead to that charge. That charge remained standing on the record until after the assessors had given their opinion to the effect that the accused struck Mangal a blow from which he died and was caught in the house of Mangal in the act of committing burglary. It is only after the assessors' opinion had been taken that the Sessions Judge recorded an order to the effect that the appellant should have been charged under section 302, Indian Penal Code, as well as section 460, and he therefore amended the charge under section 227, Criminal Procedure Code; but in making this alteration the learned Judge entirely overlooked the limitations of section 227, in which it is clearly laid down that such an

alteration is only permissible up to the time of the taking of the opinion of the assessors. He also overlooked section 231 of the same Code under which it is imperative that the Court when it has altered the charge, or added to the charge, after the commencement of the trial, should allow the prosecutor and the accused to re-call, or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material. Further, section 232, Criminal Procedure Code, does not seem to have been in the mind of the learned Judge, for it is evident from that, that if this Court thinks that in consequence of material errors in the charge the accused has been misled this Court is bound to direct a new trial to be had upon a charge framed in the proper manner. It seems to us quite clear that the accused in the present case, apart from the illegality of altering the charge after the assessors' opinion was taken, should have been asked what he had to say to the new charge and whether he wished to produce any further evidence and so forth. It is thus our duty now to decide whether we should simply set aside the conviction under section 302 and find the accused guilty under section 460, Indian Penal Code, or whether we should order a re-trial under section 302.

We have carefully considered this point, and, in view of the fact that the fatal blow was given in the dark in the course of a scuffle in the earlier part of which some minor blows were inflicted, we think it is open to argument whether the accused intended to cause death or even to cause such bodily injury as was likely to cause death. No doubt the weapon is a dangerous one; but the struggle took place in the dark, and on the whole we think that justice will be sufficiently satisfied by a conviction under section 460, Indian Penal Code, which was the original charge to which the accused pleaded. We therefore set aside the conviction under section 302, Indian Penal Code, and find the accused guilty under section 460, Indian Penal Code, and sentence him to transportation for life.

We have considered the question whether the sentence should be less than transportation for life and have come to the conclusion that it should not. The offence of burglary armed with a deadly weapon is in itself a very serious one, and when to this is added the crime of reckless use of the deadly weapon, we think that no possible reason exists for giving any thing but the maximum sentence.

No. 34.

Before Hon. Mr. Justice Chevis and Hon. Mr. Justice
Broadway.

ABDUL AZIZ—PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 330 of 1916.

Criminal Procedure Code, Act V of 1898, sections 4 (m), 100 and 476—power of Magistrate to examine persons on oath—Indian Oaths Act, X of 1873, sections 4, 5 and 12—sanction to prosecute false witnesses for perjury.

Held, that in proceedings under section 100 of the Code of Criminal Procedure a Magistrate is a "Court" within the meaning of section 4 of the Indian Oaths Act, empowered to examine persons on oath and such persons are bound to take the oath and to state the truth, *vide* sections 5 and 14 of that Act.

Held also, that the proceedings before the Magistrate are "judicial proceedings" within the meaning of sections 4 (m) and 476 of the Code of Criminal Procedure and the Magistrate is authorised to sanction the prosecution of a witness for making a false statement before him on oath in the course of such proceedings.

I. L. R. 12 Bom. 36 (1), I. L. R. 15 Mad. 138 (F. B.) (2), 15 Indian Cases 652 (F. B.), (3) I. L. R. 15 All. 141 (4) and I. L. R. 39 Cal. 953 (966) (5), referred to.

I. L. R. 27 Cal. 455 (6), practically dissented from in 8 Bom. L. R. 589 (7), not followed.

I. L. R. 12 Bom. 36 (1) and I. L. R. 6 All. 487 (8), distinguished and 9 P. R. (Cr.) 1908 (9), referred to.

I. L. R. 16 Mad. 421 (10), followed in 8 Bom. L. R. 589 (7), I. L. R. 19 Mad. 18 (11), I. L. R. 14 Bom. 381 (12), I. L. R. 28 All. 89 (13) and I. L. R. 15 Cal. 109 (14), approved.

I. L. R. 39 Cal. 403 (15) and 2 P. R. (Cr.) 1893 (16), distinguished.

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- (1) (1887) *I. L. R. 12 Bom. 36 (Queen-Empress v. Tulja).*
 - (2) (1891) *I. L. R. 15 Mad. 138 (F. B.) (Atchayya v. Gangayya).*
 - (3) (1912) *15 Indian Cases 652 (F. B.) (Krishna Mal v. Krishnaiyengar).*
 - (4) (1893) *I. L. R. 15 All. 141 (Queen-Empress v. Ram Lal).*
 - (5) (1912) *I. L. R. 39 Cal. 953 (966) (P. C.) (Clarke v. Brajendra).*
 - (6) (1900) *I. L. R. 27 Cal. 455 (Hari Charan Singh v. Queen-Empress).*
 - (7) (1906) *8 Bom. L. R. 589 (Emperor v. Vishwanath).*
 - (8) (1884) *I. L. R. 6 All. 487 (Queen-Empress v. Sheedi Lal Rai).*
 - (9) *9 P. R. (Cr.) 1908 (Ilam Din v. King-Emperor).*
 - (10) (1892) *I. L. R. 16 Mad. 421 (Queen-Empress v. Alagu Kone).*
 - (11) (1895) *I. L. R. 19 Mad. 18 (Queen-Empress v. Tirunarasimha Chari).*
 - (12) (1889) *I. L. R. 14 Bom. 381 (Queen-Empress v. Manaji).*
 - (13) (1905) *I. L. R. 28 All. 89 (Emperor v. Kuna Sah).*
 - (14) (1887) *I. L. R. 15 Cal. 109 (Mahomed Jackariah & Co. v. Ahmed Mahomed).*
 - (15) (1911) *I. L. R. 39 Cal. 403 (Gora Mian v. Abdul Majid).*
 - (16) *2 P. R. (Cr.) 1893 (Lalu v. Queen-Empress).*

Revision from the order of W. de M. Malan, Esquire, Sessions Judge, Jullundur, dated the 1st February 1916.

Obedullah, for Petitioner.

Government Advocate, for Respondent.

The judgment of the Court was delivered by—

BROADWAY, J.—On the 21st December 1915, Abdul Aziz, 22nd June 1916.
the petitioner in this case, filed an application before S. M. Jacob, Esquire, I. C. S., a Magistrate of the 1st class at Jullundur, which purported to be under section 100, Criminal Procedure Code. In that application Abdul Aziz alleged that his daughter Rahmat Bibi and his son Fazl Karim, both minors, were detained in the house of one Fateh Din who was wrongfully restraining them. It was prayed that a warrant should be issued under section 100, Criminal Procedure Code, and that the said children should be taken from Fateh Din's house and brought before the Court.

Mr. Jacob examined the petitioner on oath and he then stated that the age of the daughter was $13\frac{1}{2}$ years and that of the son $10\frac{1}{2}$ years, Mr. Jacob thereupon issued a warrant in the usual form under section 100, Criminal Procedure Code. In compliance with this warrant the two children were taken from the house of Fateh Din and brought before Mr. Jacob on the 4th January 1916.

It was then discovered that the daughter Rahmat Bibi was obviously at least 17 years of age, and Fazl Karim 13 years or more, Rahmat Bibi stated that she was living with Fateh Din as she had been married to him a fortnight or so previously.

Mr. Jacob accordingly found that the girl and the boy were content to live with Fath Din and declined to pass any further orders in the matter.

On the same day, *i. e.*, on the 4th January 1916, he passed an order (purporting to be under section 195, Criminal Procedure Code, but obviously passed under section 476, Criminal Procedure Code) sanctioning the prosecution of the petitioner under section 193, Indian Penal Code, for having made a false statement on oath before him with regard to the respective ages of Rahmat Bibi and Fazl Karim. The case was sent to the District Magistrate for orders. Abdul Aziz appealed to the Sessions Judge, Jullundur, who failed to notice that the order having really been passed under section 476, Criminal Procedure Code, was not appealable, and going into the merits declined to interfere.

The petitioner has come up to this Court under section 439, Criminal Procedure Code, mainly on the ground that the proceedings under section 100, Criminal Procedure Code, were not "judicial proceedings" and therefore Mr. Jacob had no power to administer any oath to him. The case was first heard by a single Judge who, considering it necessary to have an authoritative decision on the point as to whether proceedings under section 100 Criminal Procedure Code, were or were not "judicial proceedings," referred the matter to a Division Bench of this Court. For the petitioner we have heard Mr. Obedullah and the learned Government Advocate has addressed us on behalf of the Crown.

Mr. Obedullah drew our attention to section 86, section 207 and section 552, Criminal Procedure Code; and cited 27 *Cal.* 455 (1), 12 *Bom.* 36 at p. 42 (2), 6 *All.* 487 (3) and 9 *P. R.* 1908 (4).

Mr. Petman contended that the sections referred to did not support Mr. Obedullah's contention, and cited 16 *Mad.* 421 (5), 19 *Mad.* 18 (6), 14 *Bom.* 381 (7), 8 *Bom. L. R.* 589 (8), 28 *All.* 89 (9) and 39 *Cal.* 403 (10). He contended that the proceedings were "judicial proceedings," and that even if they were not, Mr. Jacob was empowered to administer an oath to the petitioner, who was then bound to make a true statement. Both the learned counsel referred to Act 10 of 1873 (The Indian Oaths Act.)

If we understood Mr. Obedullah aright, his contention was that a Magistrate or Court has not, ordinarily, any power to administer an oath to any person except in the course of a trial of, or inquiry into, an offence, and that when the legislature considered it expedient that a Magistrate should be given power to administer an oath in any other proceeding, it gave that power specifically. As instances of such powers being specially conferred he referred to sections 200 and 552, Criminal Procedure Code. (He also referred to section 86, Criminal Procedure Code, but we are unable to understand with what object, nor can we see that that section has any bearing on the point before us.)

(1) (1900) *I. L. R.* 27 *Cal.* 455 (*Ilari Charan Singh v. Queen-Empress*).

(2) (1887) *I. L. R.* 12 *Bom.* 36 (42) (*Queen-Empress v. Tulja*).

(3) (1884) *I. L. R.* 6 *All.* 487 (*Queen-Empress v. Sheodi Lal Rai*).

(4) 9 *P. R.* (Cr.) 1908 (*Ilam Din v. King-Emperor*).

(5) (1892) *I. L. R.* 16 *Mad.* 421 (*Queen-Empress v. Alagu Kone*).

(6) (1895) *I. L. R.* 19 *Mad.* 18 (*Queen-Empress v. Tirunarsimha Chari*).

(7) (1889) *I. L. R.* 14 *Bom.* 381 (*Queen-Empress v. Manaji*).

(8) (1906) 8 *Bom. L. R.* 589 (*Emperor v. Vishwanath*).

(9) (1905) *I. L. R.* 28 *All.* 89 (*Emperor v. Kuna Sah*).

(10) (1911) *I. L. R.* 39 *Cal.* 403 (*Gora Mian v. Abdul Majid*).

Turning to section 4 of Act 10 of 1873 we find that all "Courts" are authorised to administer oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them by law.

The Criminal Procedure Code contains no definition of the word "Court" nor is a definition of it to be found in the General Clauses Act (10 of 1897), but according to section 3 of the Indian Evidence Act the word "Court" includes all Magistrates. Whether this definition can be held to apply to the Criminal Procedure Code or not, is a matter on which there are conflicting decisions—see *Queen-Empress v. Tulja*, (12 Bom. 36) (1), *Atchayya, etc., v. Gangayya*, (15 Mad. 138, (F. B.)) (2), *Krishna Mal v. Krishnaiyengar*, (15 I. C. 652 (F. B.)) (3), *Queen-Empress v. Ram Lal*, (15 All. 141) (4), but we may at any rate take that definition as a guide, and we consider that a Magistrate must be held to be included in the words "Court" as used in the Indian Oaths Act. We may in this connection refer to section 6, Criminal Procedure Code, which prescribes the classes of Criminal Courts in British India and includes the Courts of Magistrates (see also 39 Cal. 953 at p. 966 (5)). It would thus seem beyond question that Mr. Jacob as a Magistrate is ordinarily empowered to administer oaths or affirmations.

Section 200, Criminal Procedure Code, does not, as contended by Mr. Obedullah, *authorise* a Magistrate to administer an oath, but lays down the procedure that a Magistrate is bound to follow when he takes cognizance of an offence on complaint. It is mandatory and directs that such Magistrate "shall at once examine the complainant upon oath". In fact it recognises that a Magistrate has the power to administer an oath and directs that the Magistrate shall exercise that power at a particular time, namely *at once*, i. e., as soon as the complainant appears before him.

Similarly section 552, Criminal Procedure Code, confers on the Magistrates specified therein (and no others) specific powers to pass certain orders of a very special nature and directs that these powers shall not be exercised except upon a complaint made on oath. Here again the authority to administer an oath is recognised and the exercise of the power already

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- (1) (1887) I. L. R. 12 Bom. 36 (*Queen-Empress v. Tulja*).
 - (2) (1891) I. L. R. 15 Mad. 138 (F. B.) (*Atchayya v. Gangayya*).
 - (3) (1912) 15 Indian Cases 652 (F. B.) (*Krishna Mal v. Krishnaiyengar*).
 - (4) (1893) I. L. R. 15 All. 141 (*Queen-Empress v. Ram Lal*).
 - (5) (1912) I. L. R. 39 Cal. 953 (966) (P. C.) (*Clarke v. Brajendra*).

possessed by the Magistrates is made compulsory as a condition precedent to the issuing of the special orders therein contemplated.

We agree therefore with the learned Government Advocate and consider that these two sections in no way support Mr. Obedullah's contention. In fact it seems to us that they refute that contention to a very large extent.

The rulings cited at the bar by both the learned counsels are admittedly not directly in point.

In *Hari Charan Singh v. Queen-Empress* (27 Cal. 455) (1), Hari Charan had been charged with a breach of the Coolie Emigration Act, and had been acquitted on the ground that he was not responsible, being the servant of some one who might have transgressed the law. After Hari Charan had been acquitted the Magistrate examined him on oath with a view to ascertaining if there were any ground for taking action against the master. Subsequently the master was summoned to appear before the Magistrate, and at the trial Hari Charan was examined as a witness, when he contradicted the statement he had already made to the Magistrate on oath. Hari Charan was prosecuted for perjury and convicted, but the High Court held that the Magistrate was not authorised to administer any oath to him when he made his first statement. We have, however, grave doubts as to the correctness of this decision) and find that it was considered in *Emperor v. Vishwanath Krishna Sathe* (8 Bom. L. R. 589) (2), and practically dissented from.

In *Queen-Empress v. Tulja* (12 Bom. 36) (3), the question before the Court was whether a *Sub-Registrar* was a 'Court' and it was held that he was not. Mr. Obedullah referred us to page 42 of the Report where occur the following words :—

"An inquiry is judicial if the object of it is to determine
"a jural relation between one person and another, or a group
"of persons, . . . but even a Judge acting without
"such an object in view, is not acting judicially".

From this it was contended that in issuing the warrant Mr. Jacob was not acting judicially and therefore was not authorised to administer an oath. This question was, however, not before the Court and this decision is not an authority for the proposition advanced.

(1) (1900) I. L. R. 27 Cal. 455 (*Hari Charan Singh v. Queen-Empress*),

(2) (1906) 8 Bom. L. R. 589 (*Emperor v. Vishwanath*).

(3) (1887) I. L. R. 12 Bom. 36 (*Queen-Empress v. Tulja*).

In *Queen-Empress v. Sheodi Lal Rai* (6 All. 487) (1), it was held that the proceedings of a Magistrate under section 88 of the Criminal Procedure Code were not "judicial proceedings" in the sense of section 4 (d) of that Code.

As pointed out however in 9 P. R. 1908, *Ilam Din v. King-Emperor* (2), the definition of this expression has been amended, the word "includes" having been substituted for the word "means" and therefore it was held by this Court that the term "judicial proceeding" was no longer limited to proceedings in which evidence may be taken on oath.

The rulings cited by Mr. Obedullah do not in our opinion support his arguments and cannot assist us in the decision of the matter.

In *Queen-Empress v. Alagu Kone* (16 Mad. 421) (3), it was held that a Magistrate acting under section 164, Criminal Procedure Code, has power to administer an oath. This ruling was followed in *Emperor v. Vishwanath Krishna Sathe* (8 Bom. L. R. 589) (4), already referred to above. In *Queen-Empress v. Tirunarasimha Chari* (19 Mad. 18) (5), it was held that a Magistrate making an inquiry preliminary to the issue of an order under section 144, Criminal Procedure Code, was acting in a stage of a judicial proceeding. In *Queen-Empress v. Manaji* (14 Bom. 381) (6), it was held that when a Magistrate acted under section 8 of the Reformatory Schools Act (V of 1876) he was empowered to take evidence as to the age of the prisoner, although the words in the section itself merely were "if he thinks the offender is under the age of sixteen years."

In *Emperor v. Kuna Sah* (28 All. 89) (7), Kuna Sah presented a petition to the Deputy Commissioner of Almora alleging that a subordinate official had been guilty of certain acts of extortion. An enquiry was made into the truth of the allegations by a Magistrate. It was held that the enquiry was a judicial proceeding.

Gora Mian v. Abdul Majid (39 Cal. 403) (8), is a case under section 552, Criminal Procedure Code, and has no bearing on the present case.

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- (1) (1834) 1. L. R. 6 All. 487 (*Queen-Empress v. Sheodi Lal Rai*).
 - (2) 9 P. R. (Cr.) 1908 (*Ilam Din v. King-Emperor*).
 - (3) (1892) 1. L. R. 16 Mad. 421 (*Queen-Empress v. Alagu Kone*).
 - (4) (1906) 8 Bom. L. R. 589 (*Emperor v. Vishwanath*).
 - (5) (1895) 1. L. R. 19 Mad. 18 (*Queen-Empress v. Tirunarasimha Chari*).
 - (6) (1889) 1. L. R. 14 Bom. 381 (*Queen-Empress v. Manaji*).
 - (7) (1905) 1. L. R. 28 All. 89 (*Emperor v. Kuna Sah*).
 - (8) (1911) 1. L. R. 39 Cal. 403 (*Gora Mian v. Abdul Majid*).

From these rulings it would appear that in proceeding under sections of the Criminal Procedure Code in which there is nothing said about examining persons on oath, it has been held that a Magistrate has the power to administer an oath and that persons speaking falsely before such a Magistrate are liable to be proceeded against under section 193, Indian Penal Code. With reference to the rulings under section 164, Criminal Procedure Code, we must however refer to a decision of this Court reported as 2 P. R. 1893, *Lalu, etc. v. Queen-Empress* (1). In that case the scope and object of section 164, Criminal Procedure Code, were considered and discussed and the learned Judges seemed to doubt whether a Magistrate when recording the statement of a person under that section could administer an oath. It was not, however, definitely decided one way or the other and therefore the decision of the Madras and Bombay High Courts are entitled to considerable weight. They are however only useful by way of analogy and cannot form the basis of a decision on the point now before us. They certainly support the view we have taken of Mr. Obedullah's contentions regarding sections 200 and 552, Criminal Procedure Code.

It is now necessary to examine section 100, Criminal Procedure Code. This section appears in Chapter VII of Part III of the Code. Part III is headed "General Provisions" and Chapter VII refers to "proceses to compel and for the discovery of persons wrongfully confined".

The section itself is as follows:—

"If any . . . Magistrate of the 1st class
 "has reason to believe that any person is confined under such
 "circumstances that the confinement amounts to an offence he
 "may issue a search warrant and the person, if
 "found shall be immediately taken before a Magistrate who
 "shall make such order as in the circumstances of the case
 "seems proper".

It will be seen that before a Magistrate can issue a warrant under this section he must have "*reason to believe*" not only that some "*person is confined*" but "*under such circumstances that the confinement amounts to an offence.*" How is the Magistrate to arrive at such a 'belief'? Is he to exercise his powers, which are purely discretionary, on the mere allegation, oral or in writing, of some interested person of whom he knows absolutely nothing? It seems to us that he would be acting most unwisely were he to do so. In our

(1) 2 P. R. (Cr.) 1893 (*Lalu v. Queen-Empress*).

opinion, when a Magistrate has an application before him containing the allegations that are required by the section and asking him to issue a search warrant under it, it is incumbent on such Magistrate to satisfy himself that there is some foundation for the application, and that in order to enable him to so satisfy himself he would be acting within his powers in making an enquiry. That such an enquiry would be a judicial enquiry and as such a "judicial proceeding," seems to us to be beyond doubt.

In *Mahomed v. Ahmed* (15 Cal. 109) (1), it was held by Norris, J. (and in this Ghose, J. concurred) that "the issue of a search warrant is a judicial act, and it ought only to be issued after judicial enquiry and upon proper materials"—in that pronouncement we unhesitatingly concur.

In our opinion it is indisputable that a judicial act can only be performed in the course of some judicial proceeding, and that any proceedings preliminary to the issuing of a search warrant under section 100, Criminal Procedure Code can only be termed "judicial proceedings." In the course of such judicial proceedings the Magistrate would be empowered to examine persons on oath, and such persons would be bound to take the oath under section 5 of the Indian Oaths Act, and under section 14 of that Act would be bound to state the truth. We accordingly hold that the petitioner in this case was rightly examined on oath by Mr. Jacob prior to the issue of the search warrant, and that the proceedings in which he was so examined were "judicial proceedings" within the meaning of section 4 (m) of the Criminal Procedure Code. We therefore dismiss this petition.

Petition dismissed.

No. 35.

*Before Hon. Sir Donald Johnstone, Kt., Chief Judge,
and Hon. Mr. Justice Broadway.*

MAMMUN AND OTHERS—(CONVICTS)—APPELLANTS,

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No 367 of 1916.

Indian Penal Code, sections 97, 99, 103 and 300, exception 2—exceeding right of defence of property—murder.

The 5 accused and another (an absconder) went on a moonlight night, armed with *chavis* and *dangs* and assaulted 2 persons who were cutting their

rice crop, one of whom received 6 distinct fractures of the bones of the skull besides a number of other wounds and was killed on the spot. The accused had strong motive for injuring the deceased.

Held, that having regard to sections 97, 103 and the fourth paragraph of section 99 of the Penal Code, it was clear that the accused had inflicted more harm than was necessary for the purpose of defence of their property.

Held also, that it was impossible to hold that the accused did not intend to cause more harm than was necessary for defence of their property, and from this it followed that they in using violence to deceased did not act in good faith though they exceeded their rights and consequently exception 2 of section 300 was not applicable and they were guilty of the offence punishable under section 302.

29 P. R. (Cr.) 1902 (1) and I. L. R. 36 Cal. 296 (2), distinguished.

Appeal from the order of Major J. Frizelle, Sessions Judge, Lahore, dated the 18th April 1916.

Oertel and Dhanraj Shah, for Appellants.

B. Bevan Petman, for Respondent.

The judgment of the Court was delivered by—

26th June 1916.

Arjan Singh.
Mammun.
Mohari,
Nawab.
Umar.

SIR DONALD JOHNSTONE, C. J.—The five persons noted in the margin were sent up to the Honorary Magistrate, 1st Class, Lahore, charged with the murder of one Arur Singh, a sixth suspect, Narain Singh by name, not having fallen into the hands of the Police, and these five persons were duly committed for trial under section 302, Indian Penal Code. After a careful trial the assessors were unanimous in holding all the accused guilty, and the learned Sessions Judge, agreeing with the assessors and finding no extenuating circumstances, convicted all of the accused and sentenced them all to death. They have appealed, and we have to consider the case also under section 374, Criminal Procedure Code.

We have heard the case argued for appellant, Narain Singh, caste barber, age 30, by Mr. Dhanraj Shah, and for the four *Teli* appellants by Mr. Oertel, and, after giving all due weight to their arguments, we are disposed to agree with the lower Court that all 5 appellants were in the affair and co-operated in the killing of Arur Singh. Having explained how we have arrived at this conclusion, we will proceed to state our view as to what offence was committed and how it should be punished.

That the unfortunate victim was killed by acts of brutal violence is clear from the medical evidence, P. W. 14, for the *post mortem* examination discloses at least six distinct fractures of the bones of the skull, five incised wounds of head and face,

(1) 29 P. R. (Cr.) 1902 (*Bag v. Emperor*).

(2) (1908) I. L. R. 36 Cal. 296 (*Baijnath Dhanuk v. Emperor*).

five contused wounds of face, and bruises on legs, while the doctor's opinion is that death was either instantaneous or occurred within an hour or two. The questions for us therefore are whether the appellants are the offenders and, if so, in what circumstances they committed the offence.

[The Court then discussed the facts and the evidence and proceeded to say].

We turn now to the question of the offence disclosed. We have been referred to 29 *P. R.* 1902 (Criminal) (1) and *I. L. R.* 36 Cal. 296 (2), but each case has to be decided on its own merits. The distinction between this case and 29 *P. R.* 1902 (Criminal) is so clear that it affords no guidance whatever : there the deed was done in the dark, here in moonlight ; there only two blows fell on the head, here ten ; there the stick used was found not formidable, here we have *chhavis* and *dangs*. In our opinion the appellants had a common object, and thus we need not stop to consider who struck which blow. One thief fled at once, and the other also fled, neither shewing fight ; and therefore exception 4 to section 300, Indian Penal Code, cannot be invoked. As regards the right of private defence of property, which is urged in argument, we have to consider sections 97, 99 and 103 of the Code. The restrictions of the right as set forth in section 97 and section 103 are to be found in section 99, and the paragraph we are concerned with is the fourth—no more harm may be inflicted than is necessary for the purpose of defence. In the present case it is manifest that it was not necessary for 6 or 7 heavily armed men to kill Arur Singh, or even to cause him very serious injury, in order to prevent theft of the rice ; and we have to look next at exception 2 to section 300, and have to ask ourselves the questions—

First, have the appellants exceeded their right of private defence ? Secondly, if so, in using violence to Arur Singh did they act in good faith, though they exceeded their right ?

Thirdly, did they act without pre-meditation ?

Fourthly, had they no intention of doing more harm than was necessary ?

If the exception is to be applied the last three questions must be answered in the affirmative. The answer to the first we have already given. We find it impossible to hold that the appellants did not intend to cause more harm than was necessary,

(1) 29 *P. R.* (Cr.) 1902 (*Bag v. Emperor*).

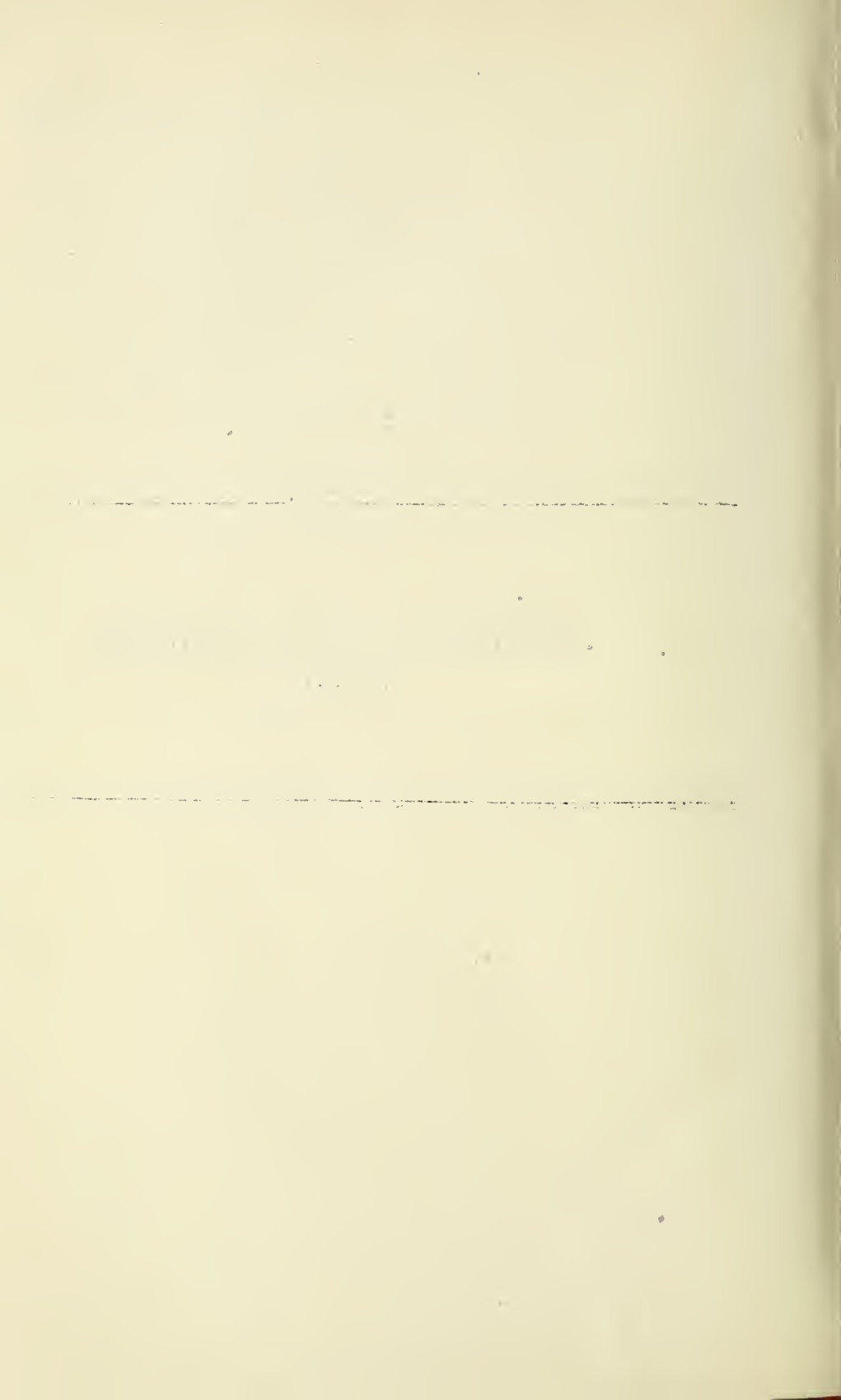
(2) (1608) *I. L. R.* 36 Cal. 296 (*Baijnath Dhanuk v. Emperor*).

[and this conclusion involves a negative answer to the second question also. It seems to us idle for any one to contend that in the continued beating of Arur Singh about the head, after he was down, they intended merely to render him *hors de combat* and unable to steal rice or to escape. We think they] intended to cause such bodily injury as they knew to be likely to result in death, or, at the least, to cause bodily injury of a kind sufficient in the ordinary course of nature to cause death.

In our opinion, therefore, the offence committed by all five appellants was murder punishable under section 302, Indian Penal Code, but, inasmuch as there was *some* provocation and no pre-meditation, we think the extreme penalty is not called for. We therefore accept the appeals, upholding the convictions, and reduce the sentences to transportation for life in each case.

Appeal accepted.

REVENUE JUDGMENTS,
1916.



Financial Commissioner, Punjab.

REVENUE JUDGMENTS.

No. 1.

*Before Hon. Mr. A. H. Diack, C. V. O., Financial
Commissioner.*

LABHA—(DEFENDANT)—APPLICANT,
Versus
TULSI AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Revenue Revision No. 11 of 1915-16.

*Indian Limitation Act, IX of 1908, articles 120 and 141—limitation for
suit by landlord to dispossess alienee of occupancy rights.*

Held, (differing from 3 P. R. (Rev.) 1910) (1) that the limitation for a suit by a landlord to dispossess a person to whom occupancy rights have been sold is six years from the date of the sale under article 120 of the Limitation Act, and that article 144 of the Act has no application to such a suit.

9 P. R. 1904 (2), 135 P. R. 1888 (3), 1 P. R. (Rev.) 1898 (4), 7 P. R. (Rev.) 1905 (5), and 6 P. R. (Rev.) 1893 (6), referred to.

*Revision from the order of the Hon. Mr. P. J. Fagan, Commissioner
of Jullundur, dated the 20th August 1915.*

Umar Bakhsh, for Petitioner.

D. R. Sahni, for Respondents.

The order of the learned Financial Commissioner was as follows:—

DIACK, F. C.—In this case the landlords (the proprietary body of the village) sued under section 77 (3) (h), Punjab Tenancy Act, to dispossess a person to whom the occupancy rights in the land in suit had been sold. The Court of first instance and the first Court of appeal held that in respect of limitation the case was governed by article 120 of the 2nd schedule to Act XV of 1877, but the former admitted the case to a hearing on the ground that the right to sue accrued only from the date on which the mutation was sanctioned, which was less than six years before the institution of the suit, while the latter considered that time ran from the date of the registered deed of sale which was more than six years before institu-

21st Feb. 1915.

(1) 3 P. R. (Rev.) 1910 (*Har Lal v. Mussammat Gohri*).

(2) 9 P. R. 1904 (*Asa Ram v. Paras Ram*).

(3) 135 P. R. 1888 (*Ram Chand v. Muhammad Khan*).

(4) 1 P. R. (Rev.) 1898 (*Jivan Singh v. Maharaja Jagat Singh*).

(5) 7 P. R. (Rev.) 1905 (*Kuria v. Nanak*).

(6) 6 P. R. (Rev.) 1893 (*Nihal v. Lakhma*).

tion and accepting appeal dismissed the claim. The second Court of appeal, that of the Commissioner, following the ruling in *Punjab Record* 3 of 1910 (1) held that article 144 of the schedule applied to the case and limitation being 12 years the case was within time and he referred the case back for disposal on the merits. The Commissioner, Mr. Fagan, in his judgment remarked as follows of the ruling quoted: "whether the view of the Financial Commissioner taken in it is sound or not is not for me to say. If it is not, it is open to the Financial Commissioner to revise his former ruling." In admitting the case to a hearing on revision Sir Michael Fenton observed as follows:—

"I am inclined to think that Sir James Douie's decision in "No. 3 Revenue of 1910 is wrong and that article 144 does not "govern limitation in suits by landlords to set aside alienation "by occupancy tenants. The time from which the period begins "to run under article 144 is 'when the possession of the defend- "dant becomes adverse to the plaintiff.' Now the possession of "the vendee of occupancy rights is possession as a tenant. It "never can become proprietary possession so long as the tenant "does not set up any claim to proprietorship. Accordingly I "am inclined to hold that article 144 is applicable only when "proprietary possession is concerned."

I have now heard counsel on the question but have heard nothing to lead me to doubt the correctness of the above view. It is urged that in certain contingencies the landlord may become entitled to possession, but that is certainly not the case here, as the decree of the Court of first instance shows, for it provides that defendants 2 and 3 the original occupancy tenants who sold their rights will not be affected but will get possession of the land. The position is very similar to that dealt with in *Punjab Record* No. 9 of 1904 (2) where a temple worshipper sued for the dispossession of the assignee of the temple manager and in which the Chief Court held that article 120 and not article 142 or article 144 was applicable. It is also urged that paragraph II of standing order 2 expressly lays down that in a suit like the present the plaintiff is entitled to a decree for possession. The object of the paragraph, however, is to make clear that the plaintiff is entitled to a decree against the alienee alone and not against the alienating tenants; in other words that he is not entitled to possession at all; and the word "possession" appears to have been used by inadvertence for "dispossession." In Revenue judgment No. 3 of 1910 (1) Sir James Douie con-

(1) 3 P. R. (Rev.) 1910 (*Har Lal v. Mussammat Gohri*).

(2) 9 P. R. 1904 (*Asa Ram v. Paras Ram*).

sidered that the mere fact of the word "dispossession" being used in section 77 (3) (h) of the Tenancy Act and the word "possession" in article 144 of schedule II of the Limitation Act made no manner of difference. There is however the important difference that dispossession of the alienee does not necessarily convoke the possession of the landlord. It was pointed out in that judgment that the above sub-section gives the landlord a choice between three kinds of suits, and it may be remarked that it would be anomalous if the period of limitation were not the same for each. If the suit takes the form of a claim to set aside the transfer it has been repeatedly held, by the Chief Court in Punjab Record 135 of 1888 (1) and by this Court in Punjab Record 1 of 1898 (2) and Punjab Record 7 of 1905 (3), that article 120 applies. It is logical that the same article should apply to the alternative claim for dispossession of the alienee, and this supports the conclusion drawn from the argument that the dispossession of the alienee does not necessarily involve the possession of the landlord. It is true that in the judgment of this Court reported in Punjab Record No. 6 of 1893 (4) a decree for possession was passed in similar circumstances but that was a case in which the lower Court had decreed possession against both the occupancy tenants and the mortgagees and the whole intention of the Financial Commissioner's judgment was to modify the decree so as to make it operative only against the mortgagees. In other words it was for dispossession rather than possession. And the question of limitation of course did not arise.

Differing therefore from the decision in Punjab Record No. 3 of 1910 (5) I hold that the present suit is governed by section 120 and that the period of limitation is 6 years. And I agree with the first Court of appeal that the right to sue accrued from the date of the sale and as that was more than 6 years before the institution of the suit the claim is barred by limitation.

Accordingly I direct under section 84 (5) Punjab Tenancy Act that the suit be dismissed. Parties to bear their own costs throughout.

Revision accepted.

(1) 135 P. R. 1888 (*Ram Chand v. Muhammad Khan*).
 (2) 1 P. R. (Rev.) 1898 (*Jiwan Singh v. Maharaja Jagat Singh*).
 (3) 7 P. R. (Rev.) 1905 (*Kuria v. Nanak*).
 (4) 6 P. R. (Rev.) 1893 (*Nihal v. Lakhna*).
 (5) 3 P. R. (Rev.) 1910 (*Har Lal v. Mussammat Gohri*).

No. 2.

Before Hon. Mr. P. J. Fagan, Financial Commissioner.

SANT BHIM SAIN—(PLAINTIFF)—PETITIONER,

versus

FAZAL—(DEFENDANT)—RESPONDENT.

Revenue Revision No. 12 of 1915-16.

Maifidar—whether entitled to a share in produce from owner in possession of the land.

This suit was brought by a maifidar against the recorded proprietor, who was in cultivating possession, for the value of one half share of produce for Kharif 1912. The *muafi* was originally granted by Maharaja Ranjit Singh to the father of plaintiff “*ba sigha dharmarth aur ba iwaz puja path.*” It was confirmed for life after annexation in 1819, resumed on death of the maifidar in August 1862, but was again released in June 1863 in favour of his son, the present plaintiff, who had apparently enjoyed it continuously up to the present.

Held, that an assignee of land revenue, as such, is not entitled to land revenue in the form of a share of the produce, nor is the mere receipt by him of such a share in the past sufficient to give him a title to such share in the future, unless he can shew that, in addition to the position of maifidar or assignee, his *status* includes certain elements or incidents of proprietary right or ownership explained in rule D. I. 3 I framed under the Land Revenue Act of 1871 on the analogous subject of the settlement of the revenue assessable on resumed assignments with the ex-assignees or their heirs, a subject now dealt with in para. 183 of the Settlement Manual on the principles underlying the rules of 1871.

Also, that if the owner is in cultivating possession of the land concerned the nature, origin and duration of such possession are matters for consideration in determining the extent of the maifidar's rights.

10 P. R. (Rev.) 1886 (1), 4 P. R. (Rev.) 1887 (2), 2 P. R. (Rev.) 1889 (3), and 14 P. R. (Rev.) 1892 (1), referred to.

1 P. R. (Rev.) 1885 (5), dissented from.

Held further, that as in this case it had not been proved that the plaintiff-assignee had any proprietary interest of the kind specified in 10 P. R. (Rev.) 1886 (1), or had at any time ejected tenants or admitted new ones, and it was found that the owner had been uninterruptedly in cultivating possession since 1862 the suit for a share of produce must fail, notwithstanding that such share had been more or less regularly paid by the defendant since 1862.

Revision from the decree of J. A. Ferguson, Esquire, Collector of Shahpur, dated 23rd April 1914.

Nanak Chand, for Petitioner.

Said Hovain, for Respondent.

- (1) 10 P. R. (Rev.) 1886 (*Sain Hashim Ali v. Fattch Haidar Shah*).
- (2) 4 P. R. (Rev.) 1887 (*Jawopir Singh v. Terra*).
- (3) 2 P. R. (Rev.) 1889 (*Fakeer v. Baba Naraingir*).
- (4) 14 P. R. (Rev.) 1892 (*Nandu v. Mulla Singh*).
- (5) 1 P. R. (Rev.) 1885 (*Bala Tej Nath v. Mut Raj*).

The preliminary judgment of the learned Financial Commissioner was as follows :—

FAGAN, F. C.—This is a suit by a mafidar against the recorded proprietor who is in cultivating possession for the value of one half share of produce claimed for Kharif 1912. The courts below have decreed revenue only. The main question involved is that of the right of an assignee of land revenue to realize a share of produce, as opposed to the mere land revenue, from the area comprised in his grant. The question has been the subject of several published revenue rulings :—

Punjab Record No. 1 of 1885,

„ „ „ 10 of 1886,

„ „ „ 4 of 1887,

„ „ „ 2 of 1889,

„ „ „ 14 of 1892.

2. The circumstances of the *muafi* are as follows :—

It was originally granted about 1828 A.D. by Maharaja Ranjit Singh to one Brahmu Sant “*ba sigha dharmarth aur bu iwaz puja path.*” On enquiry after annexation in 1849 the mafidar was found in possession and the grant was accordingly confirmed for life. On his death it was resumed by order dated the 12th August 1862, but was again released on 8th June 1863 in favour of his son Bhim Sain, the present plaintiff. The grant appears to have been continuously enjoyed up to the present.

3. In the *khewat* of the Settlement of 1853 the entry in the ownership column was “*mafidar Brahmu Sant aur milkiat hasb aur zamin zamindaran deh ki hai.*”

In the Settlement Record of 1858 the mafidar's name does not appear in the ownership column but in the remarks column we find “*mafidar balai kar leta hai aur babat haq zamindaran ser man malik ko deta hai. Turaddud chob chakal waghairu zimme mafidar hai*” In the standing record of 1892 the mafidar's name appears in the rent column thus :—“*Yastni mafidar balai bahissa nisf bila bhusa bad minhai kharach kamian.*” This entry is repeated in the standing record of 1911-12.

4. In 1857 it appears that some proceedings took place between the predecessors of the parties in which the question of the mafidar's right to a share of the produce was raised. The area involved was apparently at that time *shamilat* and

24th May 1916.

the lambardar of the village while admitting that for a long period the mafidar had realized a share of produce claimed that in future he should be restricted to a cash rate. By a *robkar* of the Settlement Superintendent, dated the 12th October 1857, the claim was dismissed and the mafidar right to a share of produce maintained, a *hijq lambardari* however being allowed to the plaintiff. In 1863 again the mafidar appears to have obtained a decree for produce.

5. The origin of claims on the part of mafidars to realize a share of produce such as the one which is advanced in the present case is to be found in the circumstance of revenue administration under Sikh rule. At that epoch the State broadly speaking took as its revenue the share of the produce which was left after deducting what was sufficient to maintain the cultivator on not too liberal a scale. The more or less customary or traditional division on this basis was half produce for the State and half for the cultivator. Except for certain minor dues, some of them of a quasi-proprietary nature, little or nothing was left for any third party or middleman. The State revenue in short was approximately the equivalent of what has now, in consequence of the limitation of the State demand under British administration, become the rent or landlord's share of the produce. It follows of course that when the Sikh administration granted any assignment it granted for the enjoyment of the assignee what would now be called not revenue but rent, the latter in fact being never less than double and oftener a larger multiple of the cash revenue assessed or assessable. I have gone into this matter and also into the history of the case at some length as the main question involved is one of considerable importance and has not, I think, been considered from the proper point of view by the courts below.

6. In the rulings already quoted that question arose in the form of claims by proprietors who had previously been paying to assignees a share of produce, the equivalent of the Sikh revenue, to pay in lieu thereof a cash revenue to be assessed at the authorised rates. In the present case the assignee sues to recover, in accordance with previous practice, a share of produce from the proprietors who, on their side, plead liability for cash revenue only. Turning to the previous decisions, the general result of No. 1 of 1885 (1) (Colonel Davies, Financial Commissioner) was that a mafidar who had taken his dues by *batai* for two or three generations was entitled to continue to do so. Colonel Wace, Financial Commissioner's views were somewhat different. The interpretation of his

(1) 1 P. R. (Rev.) 1885 (*Baba Tej Nath v. Mul Raj*).

decision in No. 10 of 1886 (1), as applied to the circumstances of the present case would appear to be that no assignee of land revenue as such is entitled to land revenue in the form of a share of the produce, nor is the mere receipt by him of such a share in the past sufficient to give him a title to such share in the future. To secure the latter it is necessary that in addition to the position of mafidar or assignee his status should include certain elements or incidents of proprietary right or ownership explained in rule D I. 3 I framed under the Land Revenue Act of 1871 on the analogous subject of the settlement of the revenue assessable on resumed assignments with the ex-assignees or their heirs. That subject is now dealt with in paragraph 183 of the Settlement Manual on the principles underlying the rules of 1871. It was further held in the above ruling that if the owner was in cultivating possession of the land concerned the mafidar would not be entitled to a (sub)-settlement; as a result of which he would of course have no title to take a share of produce from the cultivating owner. The subsequent rulings which I have quoted proceeded generally on the same principles as those indicated above; see especially No. 4 of 1887 (2) and No. 14 of 1892 (3).

7. In this case the courts below have apparently proceeded on the simple principle that a mafidar or assignee as such not being a proprietor can under no circumstances be entitled to a share of produce. It is however possible, as appears from the rulings quoted above, that, at all events so long as an assignment of land revenue continues, the proprietary right or rights of ownership may be divided between the assignee and the recorded proprietor in such wise that though the proprietor or his heirs may be entitled to an ultimate reversion the assignee is for the time being entitled to a share of produce as rent from the cultivator. The learned Commissioner, if I understand him rightly, would hold that a proprietor can under no circumstances pay rent; but this is scarcely correct as a universal proposition, *e.g.*, it is quite possible that a proprietor should hold land and pay rent as a tenant-at-will under his own occupancy tenant or under his own mortgagee, who would then be in the position of a landlord.

8. The real question for decision in this case is whether the plaintiff has any proprietary interests in the land in suit of the kind explained in paragraph 6 above. No issue was framed on this important point and no definite enquiry has

(1) 10 P. R. (Rev.) 1886 (*Sain Hashim Ali v. Fattch Haidar Shah*).

(2) 4 P. R. (Rev.) 1887 (*Jawapir Singh v. Torra*).

(3) 14 P. R. (Rev.) 1892 (*Nandu v. Malla Singh*).

been made. There is however a certain amount of material on the record which tends to indicate that the plaintiff has such interests. I refer more especially to the proceedings of 1857 and 1863 and to the fact that he has been taking a share of produce for the long period which has since elapsed. On the other hand the owner, the defendant, is in cultivating possession, but it is not quite clear for how long this has been the case and whether his possession has been uninterrupted. From the *Jumabandi* of 1901 which has been called for it appears that in that year the assignee leased the land to one Hukam Chand Arora. Under the circumstances it is, I think, necessary to return the case to the Collector for an enquiry and finding on the following points:—

(1) Has the assignee, the plaintiff, any proprietary interest in the land in suit of the kind specified in Punjab Record 10 of 1886?

(2) Has he at any time ejected tenants, or admitted new ones?

(3) Since when has the defendant, the owner, been in possession without interruption?

(4) Since when has he paid a share of produce to the assignee and has that share been a uniform one or has it varied?

The return to this order should be made by July 1st.

The final judgment of the learned Financial Commissioner was as follows:—

13th July 1916.

FAGAN, F. C.—A return to my order of 24th May 1916 has been received. On issues (1) and (2) the findings of the Assistant Collector are against the plaintiff. On issue (3) it is found that the defendant has been uninterruptedly in cultivating possession since 1862 and on issue (4) that *batai* has been more or less regularly paid by the defendant since that date. I accept the above findings. It follows that the plaintiff is not entitled to realize a share of produce from the defendant. The application for revision is accordingly dismissed. The applicant will pay the respondent costs in this court.

Revision rejected.

No. 3.

Before Hon. Mr. P. J. Fagan, Financial Commissioner.

LAKHI AND OTHERS, SONS OF NATHU, ETC., TEN-
ANTS—(PLAINTIFFS)—PETITIONERS,

Versus

AMAR SINGH AND OTHERS, LANDLORDS—
(DEFENDANTS)—RESPONDENTS.

Revenue Revision No. 64 of 1915-16.

Punjab Tenancy Act, XVI of 1887, section 5 (1) (c)—settlement of tenant "by the founder" and "along with the founder."

Held, that the meaning of settlement "along with the founder" in section 5 (1) (c) of the Tenancy Act is settlement contemporaneously, or in association, with the original founder during the initial stages of foundation and development of the village.

94 P. R. 1880 (1), referred to.

But that settlement, "by the founder," might take place after those stages had passed, and accordingly where a cultivator is shown to have commenced to reside, and to cultivate *shamilat* land, in a village during the lifetime of a founder thereof, such founder being at the time *lambardar* or otherwise directly concerned with the management of the *shamilat*, there is a fair presumption that the cultivator in question was settled in the village "by the founder thereof as a cultivator therein," rebuttable, of course, by adequate proof of facts inconsistent with, or contradicting, such presumption.

*Revision from the decree of Lieutenant-Colonel C. M. Dallas,
Commissioner of Ambala, dated the 9th November 1915.*

Broadway, for Petitioners.

Duni Chand, for Respondents.

The judgment of the learned Financial Commissioner was as follows :—

FAGAN, F. C.—1. I will deal with the three cases Nos. 64, 65 and 66 in one order as the facts with which the revision is concerned are the same in all of them. They are fully set out and discussed in the orders of the learned Commissioner, of the Collector and of the original Court.

2. The learned Commissioner came to the conclusion that Hazari was not settled as a cultivator in the village of Bobwa, that is to say, as I understand, that he did not cultivate land there but was engaged solely in carrying out whatever at that period may have been the duties of a *patwari*. There is of course no direct proof that he did cultivate land. From an inspection of the Settlement Record of 1840 (the first regular settlement) it appears that the cultivating body of the village

consisted of proprietors (*maliks*), *qadim kisans* and *toladars*. The last two terms are explained at pages 218, 229 and 230 of the Hissar District Gazetteer from which it will be seen that the *qadim kisan* was a proprietor of his holding without any share in the *shamilat*. The Settlement Record of 1840 contains no list nor register of cultivators, except one of *kadim kisans* and the name of Hazari does not appear on this. He and his appointment as patwari are expressly mentioned in the *wajib-ul-arz* of 1840 but nothing is said as to his having been given land to cultivate whereas had he been a cultivator it seems very unlikely that this fact would not have been alluded to. It is true that the word *bz-dakhl* is used with reference to him but this is a somewhat slender foundation on which to rest the conclusion that he was a cultivator in addition to being a patwari. A good deal has been made of the fact that Hazari's recorded emoluments only amounted to Rs. 2 per mensem, but it must be remembered that he was a *banya* by caste and as was customary with the patwaris of those days it is probable that he made money by trade and money-lending. It is true that in 1857 his son Nathu appears from the Settlement Record of 1863 to have been cultivating some 200 *bighas* or 150 acres as a tenant but this does no more than render it possible that Hazari may have cultivated some or all of that area in his lifetime and certainly does not amount to proof that he did so. On the whole I agree with the Commissioner as regards this part of the case, being of opinion that there is not sufficient material for a definite affirmative finding that Hazari was a cultivator in the village.

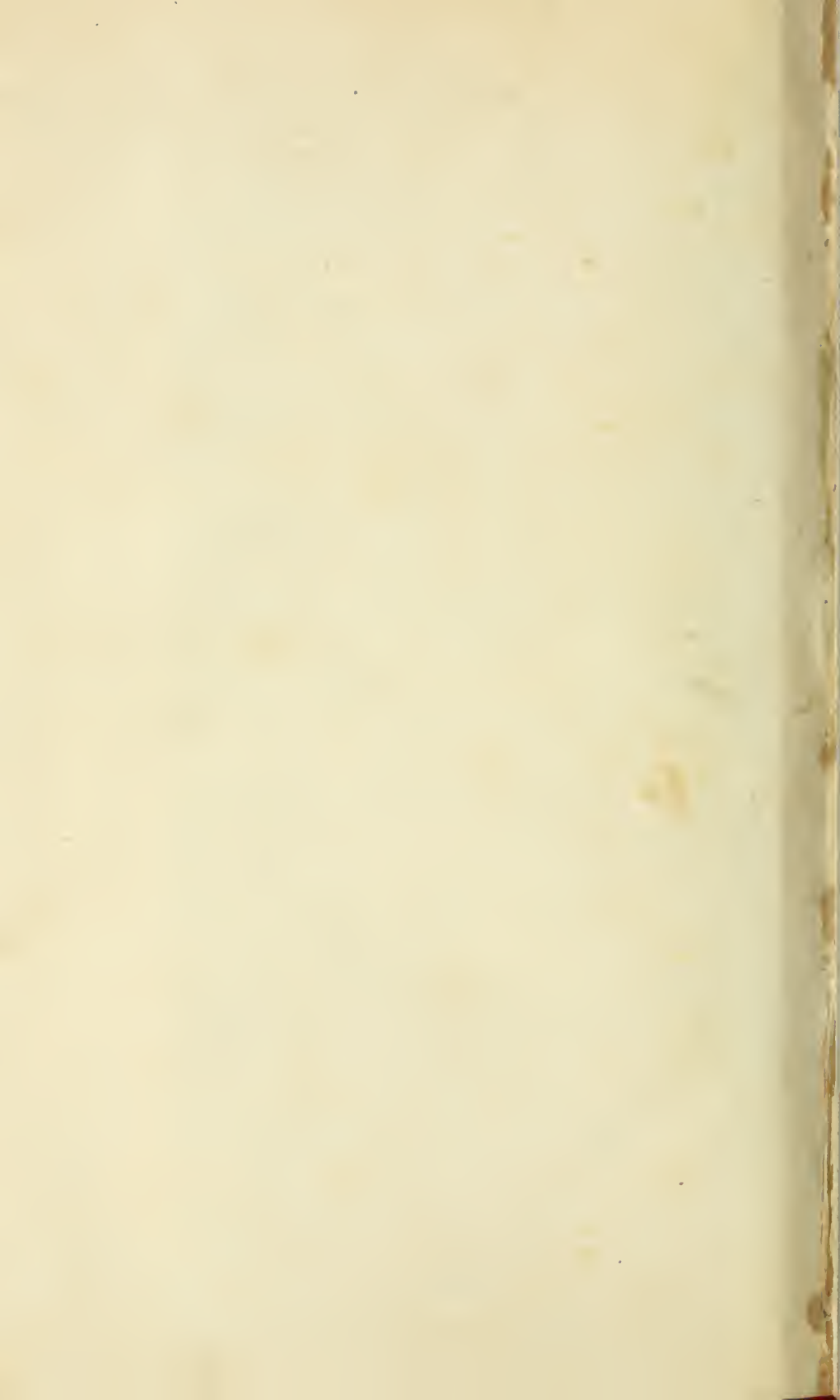
3. There remains the question whether Nathu in virtue of his having cultivated land in the village from 1857 or thereabouts, can be regarded as having been settled in the village by the founder thereof as a cultivator therein. Regarding this the facts are that, as appears from the Settlement Records of 1840 and 1863 A. D., Basti, son of Piru, one of those who joined in the original foundation of the village and who was therefore one of the joint founders, was alive as late as 1863. He was not a lambardar. The Basti who was one of the three persons who held that office was a son of Sham Das, one of the founders. The land which Nathu, son of Hazari cultivated in 1863 was village *shamilat* which according to an entry in the *wajib-ul-arz* of 1863 was managed by the lambardars in consultation with certain other proprietors who are mentioned by name but do not include Basti, son of Piru. It would appear therefore that Basti, son of Piru had

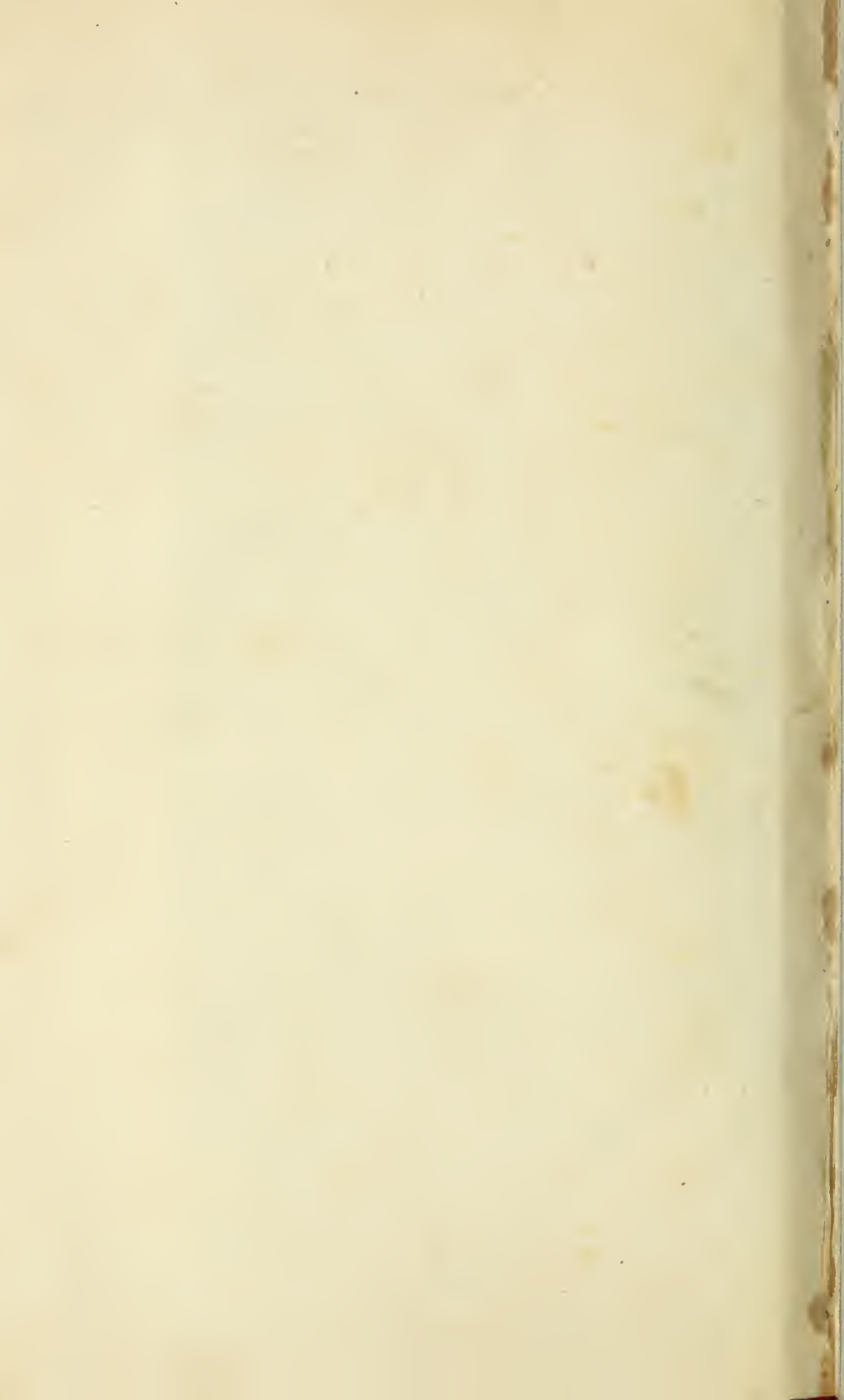
nothing to do with settling cultivators on the *shamilat* in 1863 and we may assume that the same was the case in 1857.

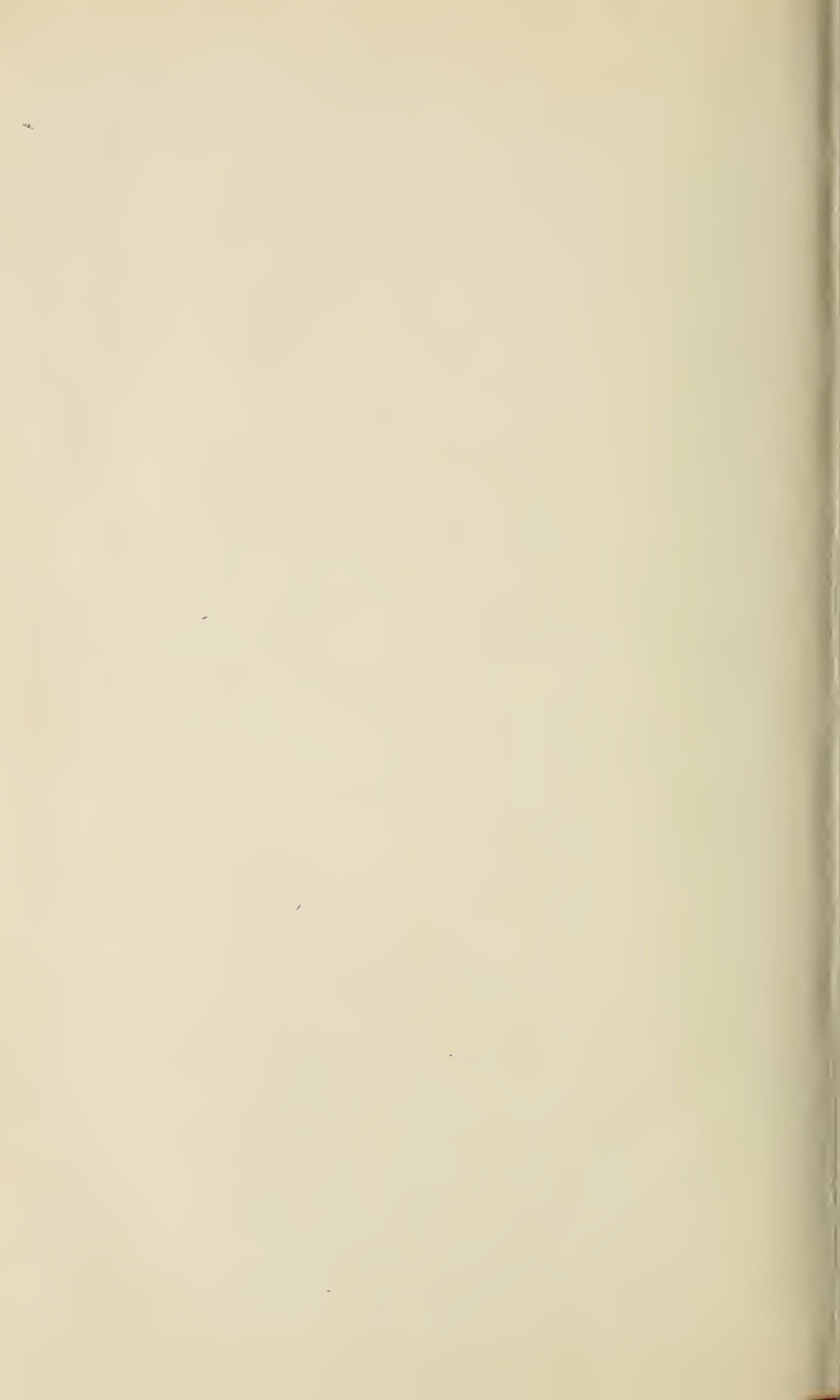
4. There are no published rulings as to the facts or circumstances which would for the purposes of section 5 (1) (c) of the Tenancy Act constitute in the case of a tenant a settlement of him in a village *by* the founder thereof as a cultivator therein. Settlement *along with* the founder, the other alternative allowed by the above clause, doubtless means settlement contemporaneously or in association with the original founder during the initial stages of the foundation and development of the village—see Punjab Record Civil No. 94 of 1880 (1). Settlement by the founder on the other hand might take place after those stages had been passed. As to this it is, I think, a fair presumption, rebuttable of course by adequate proof of facts inconsistent with or contradicting it, that where a cultivator is shown to have commenced to reside in and to cultivate *shamilat* land in a village during the lifetime of a founder thereof, such founder being at the time a lambardar or otherwise directly concerned with the management of the *shamilat*, the cultivator in question was settled in the village “by the founder thereof as a cultivator therein” and so far fulfils the requirements of section 5 (1) (c).

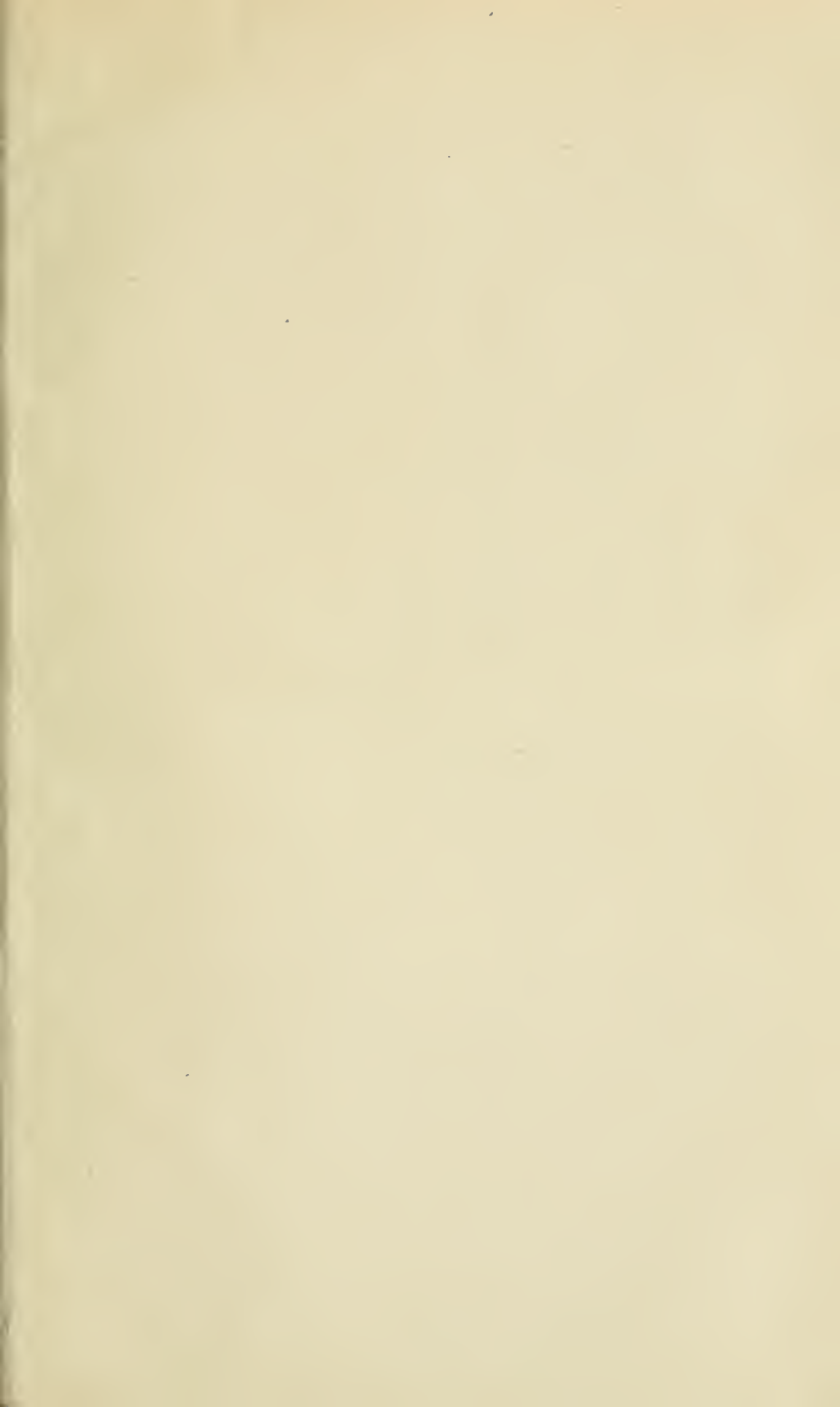
In the present case it appears that when Nathu, son of Hazari, began to cultivate *shamilat* land, Basti, son of Piru, the then sole surviving founder, was not a lambardar nor did he share in the management of the *shamilat*. Under these circumstances the presumption which has been defined above is not applicable or rather would, if applied, be sufficiently rebutted. For these reasons I agree with the learned Commissioner's conclusion that it is not satisfactorily established that Nathu was settled in the village of Bobwa by one of the founders. The plaintiffs have therefore no claim to occupancy rights under section 5 (1) (c). The petitions for revision are dismissed. Applicants will pay respondent's costs in this Court.

Revision rejected.









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